Supreme Court, U.S.
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No. 09-209

IN THE
Supreme Court of the United States

BRIAN S. CULVER,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari
To The Alabama Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

INTRODUCTION

The Defendant/Petitioner, Brian S. Culver, was convicted in Jefferson County, Alabama, of two (2) separate charges of the offense of "possession of obscene materials." The evidence of each offense was circumstantial, and Mr. Culver's alleged possession was constructive. The first charge was based on a package of Polaroid photographs that were found by police in a home office area during an initial search of the house in the very early morning of November 13, 2003. Mr. Culver was arrested then, and thereafter had no access to the house. The second charge was based on an 8mm videotape that was found by a police officer in an attic area during a second search of the house on November 14, 2003. On appeal, the Alabama Court of Criminal Appeals held that these alleged possessions constituted only one (1) criminal act, and remanded the case to the trial court with an order to vacate the conviction and sentence on the second case involving the 8mm videotape.

QUESTIONS PRESENTED

I. Does the Fifth Amendment's prohibition against Double Jeopardy and the Sixth Amendment's guarantee of the right to Trial by Jury require that a defendant receive a new trial, as opposed to merely

having one (1) of his convictions and sentences vacated, when the defendant was charged, prosecuted, convicted, and sentenced for two (2) separate offenses that were found by the Alabama Court of Criminal Appeals to be only one (1) criminal act?

II. Is a defendant deprived of his Sixth Amendment right to Confrontation and his Fourteenth Amendment right to due process when he is not allowed to conduct a noninvasive examination of an alleged minor victim and her mother to obtain photographs of those individuals to compare with alleged obscene materials, for the purposes of including or excluding these individuals as the individuals depicted in the alleged obscene materials and challenging the credibility of key witnesses, particularly when the prosecution had already taken photographs to inculpate the defendant?

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

The Defendant/Petitioner, Brian S. Culver ("Mr. Culver"), respectfully petitions for a writ of certiorari to review the opinion and judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals, dated May 30, 2008, has not yet been released for publication and officially reported, and is reproduced at App. A, 1a-65a.

The Alabama Court of Criminal Appeals' denial of Mr. Culver's Application for Rehearing is not officially reported and is reproduced at App. B, 66a-67a.

The Alabama Supreme Court's denial of Mr. Culver's Petition for Writ of Certiorari is not officially reported and is reproduced at App. C, 68a-69a.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals sought to be reviewed was entered on May 30, 2008. Mr. Culver timely filed an Application for Rehearing, as required by *Alabama Rules of Appellate Procedure* Rule 40. The Application for Rehearing was denied on August 22, 2008. Mr. Culver timely petitioned the Alabama Supreme Court for a writ of certiorari. Mr. Culver's Petition for Writ of Certiorari was denied on May 15, 2009. This Petition is timely under 28 U.S.C. § 2101(d) and Supreme Court Rule 13.1 because it is filed within ninety (90) days after the entry of the order denying discretionary review by the Alabama Supreme Court, the state court of last resort in this case. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOVLED

The Fifth Amendment to the U.S. Constitution provides that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V.

The Sixth Amendment to the U.S. Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const., amend. VI."

The Fourteenth Amendment to the U.S. Constitution provides that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

INTRODUCTION

This action arises from criminal convictions sustained by Mr. Culver in Jefferson County, Alabama. Mr. Culver was initially charged with four (4) offenses in total; one (1) count of violating Alabama Code § 13A-6-131, prohibiting domestic violence in the second degree, one (1) count of violating Alabama Code § 13A-12-215, prohibiting "furnishing drugs to a minor," and two (2) counts of violating Alabama Code § 13A-12-192, prohibiting possession of obscene materials containing visual depictions of a person under seventeen (17) years of age. Trial Clerk's Record, at 189-90. Mr. Culver was acquitted by the jury of "domestic violence" and "furnishing drugs to a minor," but was found guilty of both counts of possession of obscene materials. *Id.*, at 30. Mr. Culver was sentenced to ten (10) years, to run consecutively, on each offense for which he was convicted.

STATEMENT OF THE FACTS

The evidence and testimony at trial showed that the events leading to Mr. Culver's arrest began on November 10, 2003, and into the early morning hours of November 11, 2003, as domestic problems began escalating between Mr. Culver and his wife of approximately nine (9) months, Sharon Culver ("Mrs. Culver"). Mr. Culver had intercepted part of a sexually explicit telephone conversation between his wife's minor daughter, K.W., who was thirteen (13) years old, and K.W.'s then-boyfriend. Trial

Transcript, at 895-96. K.W. and her boyfriend were discussing their recent "sexual acts." *Id.*, at 896. When Mr. Culver heard the conversation, he woke up Mrs. Culver, who asked him to record it. *Id.*, at 1321.

Mr. and Mrs. Culver confronted K.W., and everyone became upset, ultimately leading to Mr. and Mrs. Culver and K.W. traveling to the boyfriend's house at 2:00 a.m. to talk about the situation, and with the entire family becoming extremely upset with each other after returning home. *Id.*, at 1321-23. At one point, Mr. and Mrs. Culver argued because Mrs. Culver did not want Mr. Culver calling K.W. names. When the argument became heated, Mr. Culver left the residence. *Id.*, at 1004.

Ultimately, Mr. and Mrs. Culver concluded that K.W. should not be left alone at home the next day, which was a school holiday. *Id.*, at 1341-42. Therefore, when Mrs. Culver went to work later that same morning of November 11, she took KW to work with her according to her and Mr. Culver's earlier plan. *Id.*, at 1348. Mr. Culver picked K.W. up from there around 2:00 p.m. and took her back to the house. *Id.*, at 1348.[1]

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[1] K.W. would later claim, as the basis for the "furnishing drugs to a minor" charge of which Mr. Culver was acquitted, that she fell asleep on the sofa at the residence, and that Mr. Culver woke her up and gave her two (2) pills, of which she took one (1) and threw one (1) in the kitchen garbage can. *Id.*, at 916-17.

Later that evening, the family attended a cross-country banquet where K.W. received several awards, and then returned home. *Id.*, at 1353-54. The family prepared for bed. Later that night, or very shortly after midnight on November 12, 2003, K.W. claimed to have been awakened by "an electrocution, like a shock," on her upper back, and awaking to find Mr. Culver "laying underneath the covers beside" her. *Id.*, at 922-23.[2]

K.W. claimed to speak to Mr. Culver briefly, then to go downstairs and get water before going to the master bedroom and waking Mrs. Culver to relate the incident. *Id.*, at 923-24. Mr. Culver came to the doorway of the master bedroom, and an argument broke out between Mr. and Mrs. Culver, with Mr. Culver denying any wrongdoing. *Id.*, at 928.

As the family argument escalated, K.W. and Mrs. Culver claimed to find several sexual items, including condoms, pornography magazines, Vaseline, and a vaginal syringe in K.W.'s bedroom. *Id.*, at 928-29. Mr. Culver denied any wrongdoing, and stated, "If you don't believe me – if you don't believe what I'm telling you, then I'm just going to leave." *Id.*, at 931. Mr. Culver left to go to his lake residence in another county, and told Mrs. Culver that he would bring back her and the children's clothing from the lake residence. *Id.*, at 1115-16.

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[2] K.W. would later claim, as the basis for the "domestic violence second degree" charge of which Mr. Culver was acquitted, that Mr. Culver shocked her with a "stun gun" while she was sleeping.

Ultimately, Mr. Culver went to the lake and came back with exactly what he said he was going to get; upon his return to the house some hours later, Mr. Culver's Jeep was laden with the clothing of Mrs. Culver, KW, and KW's brother. *Id.*, at 359.

Meanwhile, Mrs. Culver called the police, and, when they responded, she insisted on a top-to-bottom search of the entire house. *Id.*, at 1248, 1384. During the search, in a bookcase between two (2) books, the police officers found two (2) envelopes, one (1) inside the other, containing Polaroid photographs. *Id.*, at 1171.

Mr. Culver returned to the residence around 6:00 a.m. on November 12, where he was arrested. *Id.*, at 1224.

The next day, November 13, 2003, Detective Darren McGairty showed Mrs. Culver the Polaroid photographs seized from the house. Later, in a videotaped interview conducted by the police, Mrs. Culver would claim to recall recognizing K.W. in the Polaroid photographs, in part, from a large birthmark on K.W.'s right side. *Id.*, at 1516-1517. K.W. would also later claim to recognize herself in these Polaroid photographs.

On November 14, 2003, Detective McGairty, the lead investigator on the case, returned to the Culver house, conducted a second search, and recovered an 8mm videotape from an attic area at the house. *Id.*, at 1762-63, 1892-93. Mrs. Culver and K.W. would claim to recognize K.W. on the videotape.

Ultimately, the Polaroid photographs were made the basis of the first charge against Mr. Culver for "possession of obscene materials," and the videotape was made the basis of the second charge against Mr. Culver for "possession of obscene materials."

PRESERVATION OF QUESTION I

In preparation for his defense at trial, and as part of raising and preserving the first issue sought to be reviewed here, Mr. Culver filed a motion in the trial court seeking to have the two (2) counts of "possession of obscene materials" consolidated into one (1) offense, or to have the State elect which offense it would prosecute and dismiss one (1) offense. The grounds for seeking this relief was that the two (2) charges were duplicitous or multiplicious, as under Alabama law, there was only one (1) alleged "possession." Mr. Culver raised and argued this issue on multiple occasions, including pretrial evidentiary hearings; *see id.*, at 15, 75-77, 303-312; trial; *see id.*, at 556-61; his motion for judgment of acquittal; *see id.*, at 2302-03; his motion for judgment notwithstanding the verdict; *see id.*, at 2567-69; and his motion for a new trial; *see* Trial Clerk's Record; at 17-27.

The defense motion was denied by the trial court at all times it was argued.

On direct appeal, Mr. Culver presented this issue to the Alabama Court of Criminal Appeals, which ruled that "the trial court erred when it determined that the possession of these items

permitted two separate charges and convictions for possession of obscene matter based solely on the fact that the obscene matter was on different media." App. A., at 1a-65a. The Alabama Court of Criminal Appeals concluded, "that the police did not locate the videotape during the initial search did not somehow create a second crime of possession of obscene matter based on the subsequent discovery of the videotape. Under current Alabama law, Culver committed only a single criminal act when he possessed both forms of obscene material. Therefore, we have no choice but to reverse the trial court's judgment and remand the cause for the trial court to vacate one of the convictions and corresponding sentence against Culver." *Id.* The court ordered that the second conviction, involving the 8mm videotape, be vacated.

Mr. Culver then filed an Application for Rehearing, alleging that the Alabama Court of Criminal Appeals had misapprehended the relief to which he was entitled, and asking for a new trial as opposed to having the second conviction and sentence vacated. The Application for Rehearing was denied.

PRESERVATION OF QUESTION II

In preparation of his defense at trial, and as part of raising and preserving the second issue sought to be reviewed here, Mr. Culver filed a motion in the trial court seeking a noninvasive physical examination of K.W. and her mother, Mrs. Culver, for the purpose of taking photographs that could be used at trial to compare to the Polaroid photographs and stills from the 8mm videotape alleged to depict

the minor victim.[3] *See* Trial Clerk's Record, at 84-87, 129-30. Mr. Culver raised and argued this issue on multiple occasions, *see, e.g.*, Trial Transcript, at 27-30, 85-86, 105, 108-114. Mr. Culver noted that the State had already, almost one (1) year after the alleged incidents of November 12, 2003, taken photographs of the alleged minor victim and her mother for the same purpose; however, these photographs did not adequately depict the areas the defense needed. *Id.*, at 165-66. At one point, the trial court held a lengthy *ex parte* hearing with the defense to review the photographs that were available, in order to determine whether to grant the defense's request for additional photographs. *Id.*, at 165-210. During this hearing, Mr. Culver argued that the additional photographs were essential to protect his constitutionally guaranteed right of confrontation.

The only evidence offered at trial to prove the age of the individual depicted in the alleged obscene materials was evidence offered by K.W. and her mother that they recognized K.W. in the materials. K.W. herself did not even remember the alleged acts depicted in the materials. *See id.*, at 1583-84. Further, the evidence identifying K.W. as the individual depicted in the Polaroid photographs and the 8mm videotape was sharply disputed at trial; K.W. herself testified that the birthmark forming the basis of Mrs. Culver's identification of K.W. *did not*

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[3] The Polaroid photographs and the 8mm videotape consisted of close-up images of the vaginal area, and did not contain any facial features. Thus, both the prosecution and the defense had to attempt to rely on minute identifying characteristics contained in and around the vaginal area.

actually appear in the Polaroid photographs, as did Detective McGairty. *Id.*, at 1051-52, 1847. Other identification evidence offered by Mrs. Culver and K.W. was sharply disputed. At trial, both Mrs. Culver and K.W. testified that they recognized K.W. as the individual in the Polaroid photographs and stills taken from the 8mm videotape, mostly from various identifying characteristics on K.W.'s hands. *See id.*, at 944-950, 1395. Particularly, K.W. showed the jury an alleged "sore" on her left pinky finger that she claimed had been there her entire life, and further claimed the "sore" was depicted in the Polaroid photographs. *Id.*, at 944-945. However, Detective McGairty was questioned as to whether any "sore" appeared "where [K.W.] said it was . . . in between those fingers." *Id.*, at 1904-05. Acknowledging that the Polaroid photographs and stills from the 8mm videotape did not even depict the area where K.W. had identified the "sore," he agreed that, "you can't look at those and tell that there's a sore in between the little finger and the ring finger." *Id.* Detective McGairty also could not produce any photographs showing the area between K.W.'s fingers, and, when asked, "There's no way to identify a sore in those pictures you claim to have showed her; right?" confessed, "I couldn't see one." *Id.*, at 1907, 1912.

Further, when K.W. was confronted about the presence of specific "triangulated freckles" that were clearly present on "freeze frame" photographs of the female in the videotape, Mr. Culver was denied his right to confront these pictures as evidence against him because the photographs previously taken by the State did not depict the areas of K.W.'s body

necessary to demonstrate the absence of these freckles and to confront the identity of the female and the age element required for conviction. As the defense had previously argued, the photography did not show the exact areas needed at the appropriate angles to make these comparisons. *See id.*, at 165-210.

The defense motion for a noninvasive physical examination for additional photographs was denied by the trial court at all times it was argued, even though the trial court specifically found that images from the videotape contained unique "identifying characteristics" that could be used to exclude or include the alleged minor victim and/or her mother as the "female subject(s)," depicted in the alleged obscene materials. *See* Trial Clerk's Record, at 51, 102; Trial Transcript, at 2258.

On direct appeal, Mr. Culver presented this issue to the Alabama Court of Criminal Appeals, which ruled that the trial court did not abuse its discretion in denying the requested additional photographs.

REASONS FOR GRANTING THE PETITION

I. The Fifth Amendment's prohibition against Double Jeopardy and the Sixth Amendment's guarantee of the right to Trial by Jury require that a defendant receive a new trial, as opposed to merely having one (1) of his convictions and sentences vacated, when the defendant was charged, prosecuted, convicted, and sentenced for two (2) separate offenses that were found by the Alabama Court of Criminal Appeals to be only one (1) criminal act.

Mr. Culver is entitled to a new trial, as opposed to merely having his second conviction and sentence vacated. This Honorable Court has, on numerous occasions, dealt with the issue of what relief is appropriate when a defendant prevails on appeal, and the decision of the Alabama Court of Criminal Appeals in this case is inconsistent with the decisions of this Honorable Court on the subject, as well as the Fifth and Sixth Amendments.

First, this Honorable Court has held that when an appellate reversal is based on "trial error" like "failure to dismiss a faulty indictment," the proper remedy is a new trial. *See Burks v. United States*, 437 U.S. 1, 11-16 (1978) (citing *Ball v. United States*, 163 U.S. 662 (1896)).[4] This result occurs

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[4] The indictment in *Ball* was fatally defective because it failed to allege that the victim died as a result of the assault by the defendants, and thus, could not support a conviction for murder. *See* 163 U.S. at 664.

because "the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." *Id.* at 16.[5]

Further, this Honorable Court has concluded that a new trial is the appropriate remedy when a defendant is inappropriately convicted of multiple offenses when he or she can only properly be guilty of one (1) offense. *See Milanovich v. United States,* 365 U.S. 551 (1961). In *Milanovich,* this Honorable Court concluded that the defendant was entitled to a new trial when she was convicted and cumulatively sentenced both for robbing a bank and receiving the proceeds of that robbery. The Court of Appeals set aside the cumulative conviction and sentence, but the defendant argued that a new trial was required. In finding for the defendant and ordering a new trial, this Honorable Court held:

> It is now contended that setting aside the sentence on the receiving count was not enough-that the conviction on the larceny

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[5] In *Burks,* this Honorable Court was considering the appropriate remedy when an appellate reversal was based on insufficient evidence, as opposed to trial error. Mr. Culver's case does not present a similar situation to *Burks,* as Mr. Culver did not obtain his appellate reversal on the basis of insufficient evidence. Nevertheless, in *Burks,* this Honorable Court discussed *Ball,* and noted that it involved a case where the defendants "obtained a reversal of their convictions due to a fatally defective indictment." 437 U.S. at 14. This Honorable Court affirmed the fundamental principle that, "we have no doubt that *Ball* was correct in allowing a new trial to rectify *trial error.*" *Id.* (emphasis in original).

> count must also be reversed, and the case remanded for a new trial. The argument is that although the evidence was sufficient to support a conviction for either larceny or receiving, the judge should have instructed the jury that a guilty verdict could be returned upon either count but not both. It is urged that since it is now impossible to say what verdict would have been returned by a jury so instructed, and thus impossible to know what sentence would have been imposed, a new trial is in order.

Id. at 554-55.

This Honorable Court ultimately concluded that "we cannot say that the mere setting aside of the concurrent sentence sufficed to cure any prejudice resulting from the trial judge's failure to instruct the jury properly." *Id.* at 555. Although the jury might have found the defendant guilty of the greater charge, "for a reviewing court to make those assumptions *is to usurp the functions of both the jury and the sentencing judge.*" *Id.* at 556 (emphasis supplied).

Admittedly, although *Burks*, *Ball*, and *Milanovich* are all instructive on what remedy is appropriate when an appellate reversal raises double jeopardy issues, none of them raise the exact issue presented here by Mr. Culver. *Burks* dealt with a situation where the appellate reversal was based on

insufficient evidence, *Ball* dealt with a single faulty indictment, and *Milanovich* dealt with two (2) inconsistent convictions. Mr. Culver's convictions are not "inconsistent" in the legal sense addressed in *Milanovich;* rather, Mr. Culver's convictions were obtained based on a multiplicious indictment. The issue of how to treat multiplicity is one that has caused considerable confusion and inconsistency.

"Multiplicity is the charging of a single offense in more than one count." *United States v. Langford,* 946 F.2d 798, 802 (11th Cir. 1991). Two (2) vices may arise when a defendant is charged with multiplicious counts. "First, the defendant may receive multiple sentences for the same offense. Second, a multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes - not one." *Id.,* (citing *United States v. Reed,* 639 F.2d 896, 904 (2d Cir.1981); *United States v. Hearod,* 499 F.2d 1003, 1005 (5th Cir.1974)).

The Eleventh Circuit has held that the "principal danger" in a multiplicious indictment is that the defendant may receive multiple sentences for a single offense. *Id.* at 804. Thus, the Eleventh Circuit has adopted the view that this first type of prejudice may be cured, and no reversal or new trial is required, when only a single sentence or a concurrent sentence is imposed. *Id.* at 804-05 (citing *United States v. Welch,* 656 F.2d 1039, 1054 n. 21 (5th Cir. 1981)).

As to the second vice created by a multiplicious indictment, that of prejudicing the jury by suggesting that a defendant has committed several crimes, not just one, the Eleventh Circuit has held that the remedy to which a defendant is entitled depends "on whether he has sustained any prejudice as a result of the multiplicious indictment." *United States v. Pierce*, 733 F.2d 1474, 1476 (11th Cir. 1984). In doing so, the Eleventh Circuit adopted the position of the Eighth Circuit in *United States v. Sue*, 586 F.2d 70, 71-72 (8th Cir. 1978)). In *Sue*, the Eighth Circuit addressed the issue of multiplicity at length:

> The proper remedy for multiplicity is a difficult question. At the trial stage, election of counts by the prosecutor or an appropriate instruction to the jury are possible remedies. Review of the failure of a trial court to apply either remedy in the case of a multiplicious indictment has generally been in terms of whether the defendant sustained any prejudice.
>
> There are two principal sources of prejudice. The source relied upon by Sue is that "the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes." The theory is

> that the jury's deliberations as to All counts (not just the multiplicious counts) may be tainted by the multiplicity.

Id. at 71.

Ultimately, the Eighth Circuit concluded that the *Sue* defendant failed to show prejudice because "the evidence of Sue's motive was strong. As a consequence, the effect on the jury of charging Sue with three counts rather than two could only have been negligible." *Id.* at 71-72. Similarly, the Eleventh Circuit has recently concluded that a multiplicity of counts in a securities fraud case was harmless error because if the prosecution were required to elect a count, the same body of evidence would still be available and would "lead inexorably to conviction again on the elected count." *Langford*, 946 F.2d at 805.

Mr. Culver respectfully argues that these Courts of Appeal decisions, while instructive on many issues that may arise when a defendant is prosecuted by multiplicious indictment, are not controlling to this case, and that the *only* proper remedy for multiplicious convictions is a new trial.

As this Honorable Court recognized in *Milanovich*, when a defendant is improperly convicted of multiple criminal offenses for an alleged course of conduct that could only support one (1) conviction, it is impossible to say what a jury would have done had they been properly instructed that only one (1) conviction was allowed. 365 U.S. at 554-55. Whether the offenses are "inconsistent" in the

legal sense does not change the basic fact that a defendant has the Constitutional right to have the jury render a "fair adjudication of his guilt free from error." *See Burks,* 437 U.S. at 16. Indeed, the offenses charged in *Milanovich* were *both* "inconsistent" *and* "multiplicious," as they charged the defendant with what could *only* be a "single offense" in more than one (1) count.

In Mr. Culver's case, the trial court consistently refused to force the prosecution to elect between the two (2) charges, or to dismiss one (1) of the charges. The jury was allowed to consider the charges as two (2) separate offenses. This was error by the trial court:

> Despite the fact that Culver was found to be in possession of a series of photographs and in possession of a videotape, the trial court erred when it determined that the possession of these items permitted two separate charges and convictions for possession of obscene matter based solely on the fact that the obscene matter was on different media. The State's assertion that Culver was properly charged with two counts of possession because the videotape and the photographs were found on different days is also not persuasive. The evidence shows that Culver's possession of the

> obscene items was simultaneous, even though the police did not find the videotape until they conducted the second search of the residence, a few days after the initial search when they found the photographs. Culver remained in custody after he was arrested outside the residence shortly after the initial search, and he had no access to the residence before the videotape was found. That the police did not locate the videotape during the initial search did not somehow create a second crime of possession of obscene matter based on the subsequent discovery of the videotape. Under current Alabama law, *Culver committed only a single criminal act* when he possessed both forms of obscene material.

App. A, at 29a-30a (emphasis supplied).

Thus, Mr. Culver's jury, like the jury in *Milanovich,* was allowed to consider multiple criminal offenses, when the evidence only supported a conviction for one (1) criminal offense. That *Milanovich* involved the trial court's failure to properly instruct the jury, and Mr. Culver's case involves the trial court's failure to force the prosecution to elect or dismiss a count, is a distinction without a difference. The result is the same; the jury returned a conviction based on a case

improperly submitted to it on multiplicious counts. The remedy is a new trial.

In Mr. Culver's case, it is truly impossible to say what the verdict of the jury might have been had the case been presented to them as one (1) count of "possession of obscene materials." The alleged "possession" of these materials by Mr. Culver was based *solely* on circumstantial evidence and constructive possession. The materials were seized from two (2) different locations in the house; the 8mm videotape was seized *after* Mr. Culver's arrest.

Because the prosecution split one (1) alleged possession in this case into two (2) offenses, the jury was able to think of the possessions as occurring separately. Had the jury been forced, by proper indictment, to think of these cases as one (1) possession, it might well have concluded there was insufficient evidence of one (1) constructive possession by Mr. Culver; it might well have asked itself *why* Mr. Culver would keep these materials in two (2) different locations; or it might well have asked itself any number of other questions that would defeat the prosecution's claim. Furthermore, because of the highly graphic content of the videotape, which was improperly charged as a separate offense, a substantial risk was created that the jury would give undue weight or evidentiary value to the Polaroids, which by themselves were far less likely to support a conviction for possession of obscene materials of a person under seventeen (17) years of age.

Moreover, by its very nature of being a "possession" case, Mr. Culver's case is vastly different and distinguishable from cases like *Langford, Sue,* and *Pierce.* *Langford* involved multiple mailings of fraudulent documents. *See* 946 F.2d at 802-05. *Sue* involved false statements made in a single security agreement. *See* 586 F.2d at 70-71. *Pierce* involved false statements made in a single loan document. *See* 733 F.2d at 1476. In such cases involving fraud, an appellate court might well conclude that any multiplicity is "harmless" because the "same body of evidence" would "lead inexorably" to reconviction. *See Langford,* 946 F.2d at 805. The same cannot be said of Mr. Culver's case; consolidation of the alleged possessions into only one (1) count would have put the evidence in a much different, possibly weaker, light to the jury.

Mr. Culver was also substantially prejudiced by the multiplicious indictments in these cases.[6] The two (2) offenses of "possession of obscene materials" were based on an allegation that Mr. Culver possessed Polaroid photographs and an extremely sexually graphic videotape of his thirteen (13) year old stepdaughter. The prejudice faced by a defendant charged with deviant sexual offenses is "too self-evident to be disregarded." *See, e.g., Jenkins v. State*, 472 So. 2d 1128 (Ala. Crim. App. 1985) (citing *New York v. Shapiro*, 409 N.E.2d 897 (1980)). "Since prosecutions for sex crimes, particularly ones regarded as deviate, tend in any event to invoke prejudicial preconceptions among

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[6] Mr. Culver respectfully argues that he is entitled to a new trial, without a need for showing the type of "psychological prejudice" to the jury apparently contemplated by cases like *Langford, Pierce,* and *Su*. This Honorable Court, in *Milanovich*, has correctly concluded that prejudice is *inherent and inescapable* when a multiplicious indictment is presented. *See* 365 U.S. at 555. ("We cannot say that the mere setting aside of the concurrent sentence sufficed to cure any *prejudice* resulting from the trial judge's failure to instruct the jury properly."(emphasis supplied). Mr. Culver respectfully argues that the proper remedy for a multiplicious indictment should not be based on factual, case-by-case determinations of prejudice; new trials are the appropriate remedy *in all cases of multiplicity* to avoid the violation of defendants' Fifth and Sixth Amendment rights, and to the extent that the decisions of the Courts of Appeals conflict with this principle, they are incorrect. Nevertheless, assuming *arguendo* that an individual analysis of prejudice resulting from multiplicity in a particular case is necessary to determine whether a new trial is an appropriate remedy, Mr. Culver respectfully notes that his jury was subjected to the irreparable "psychological prejudice" that must inevitably follow from being presented with the allegation that Mr. Culver had committed multiple offenses of a sexual nature against his thirteen (13) year old stepdaughter.

jurors, the joinder of the indictments [offenses] created an impermissible risk. . ." *Id.* It would have been bad enough for Mr. Culver to be charged with one (1) count of possession of these materials, which would naturally inflame the prejudices of the jury; to improperly separate the possession into multiple counts was even worse.

Finally, Mr. Culver is entitled to a new trial because there is no fair and simple way to determine *which* conviction in this case was the "multiplicious" conviction. The jury in Mr. Culver's case returned two (2) convictions based on improperly multiplicious charges. The Alabama Court of Criminal Appeals elected to set the second one aside. Why it chose to set aside the second conviction regarding the videotape, instead of the first conviction involving the Polaroids, could be the subject of endless speculation; however, the fact remains that this decision was made by the *appellate court* and not the *jury;* in violation of Mr. Culver's Sixth Amendment rights. By choosing to set aside Mr. Culver's second conviction and sentence, the Alabama Court of Criminal Appeals has quite simply usurped the authority of the jury.

The Constitutional bar against Double Jeopardy found in the Fifth Amendment, and the Sixth Amendment's guarantee of the right to Trial by Jury require that a defendant receive a new trial, as opposed to merely having one (1) of his convictions and sentences vacated, when he has been charged, prosecuted, convicted, and sentenced pursuant to a multiplicious indictment.

II. A defendant is deprived of his Sixth Amendment right to Confrontation and his Fourteenth Amendment right to due process when he is not allowed to conduct a noninvasive examination of an alleged minor victim and her mother to obtain photographs of those individuals to compare with alleged obscene materials, for the purposes of including or excluding these individuals as the individuals depicted in the alleged obscene materials and challenging the credibility of key witnesses, particularly when the prosecution had already taken photographs to inculpate the defendant.

Mr. Culver's Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process were denied when he was not allowed to conduct a noninvasive physical examination of the alleged minor victim and her mother to obtain photographic evidence to rebut the State's contention that K.W. was depicted on the Polaroid photographs and 8mm videotape, particularly when the State had previously conducted a similar examination itself and taken photographs to aid it in proving its case at trial.

This Honorable Court has previously discussed the scope of a defendant's Sixth Amendment and Fourteenth Amendment rights as they apply to pretrial discovery issues. In *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987), it considered whether the Sixth Amendment required

Pennsylvania to disclose records kept by its Children and Youth Services department so that the defendant could develop exculpatory evidence and effectively exercise his right of cross examination. In a plurality opinion, the *Ritchie* Court held:

> The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. *Delaware v. Fensterer,* 474 U.S. 15, 18-19, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (*per curiam*). Ritchie does not allege a violation of the former right. He was not excluded from any part of the trial, nor did the prosecutor improperly introduce out-of-court statements as substantive evidence, thereby depriving Ritchie of the right to "confront" the declarant. See *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Cf. *United States v. Inadi,* 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986). Instead, Ritchie claims that by denying him access to the information necessary to prepare his defense, the trial court interfered with his right of cross-examination.

480 U.S. at 51.[7]

Although this Honorable Court noted that, "of course, the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable," the plurality ultimately rejected the *Ritchie* defendant's argument that "the failure to disclose information that might have made cross-examination more effective undermines the Confrontation Clause's purpose of increasing the accuracy of the truth-finding process at trial." *See id.* at 51-52. In rejecting this argument, the plurality indicated that the right to confrontation is a *trial* right, designed only to "prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Id.* According to the plurality, a broader reading of the Confrontation Clause would transform it "into a constitutionally compelled rule of pretrial discovery." *Id.*

However, the plurality opinion went on to state, "this is not to suggest, of course, that there are no protections for pretrial discovery in criminal cases. We simply hold that with respect to this issue, the Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial

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[7] Mr. Culver, like the *Ritchie* defendant, does not allege any violation of his right to physically face those who testified against him. Rather, he alleges that, by foreclosing him from obtaining additional photographs of K.W. and Mrs. Culver, after the State had already done so in order to inculpate him, he was denied access to information that was fundamentally necessary to prepare his defense, which interfered with his right of cross examination of K.W.

production of information that might be useful in preparing for trial." *Id.* at 53, n.9. In considering how to analyze the protections for pretrial discovery in criminal cases, the plurality held:

> This Court has never squarely held that the Compulsory Process Clause guarantees the right to discover the *identity* of witnesses, or to require the government to produce exculpatory evidence. But cf. *United States v. Nixon,* 418 U.S. 683, 709, 711, 94 S.Ct. 3090, 3108, 3109, 41 L.Ed.2d 1039 (1974) (suggesting that the Clause may require the production of evidence). Instead, the Court traditionally has evaluated claims such as those raised by Ritchie under the broader protections of the Due Process Clause of the Fourteenth Amendment. See *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See also *Wardius v. Oregon,* 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). Because the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials

> establish a clear framework for review, we adopt a due process analysis for purposes of this case. Although we conclude that compulsory process provides no *greater* protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment. It is enough to conclude that on these facts, Ritchie's claims more properly are considered by reference to due process.

Id. at 56.

Thus, even in the narrower view of the Sixth Amendment right of confrontation adopted by the plurality, a criminal defendant has certain pretrial discovery rights that are constitutionally protected so that his due process rights may be observed.

In his concurring opinion, Justice BLACKMUN wrote separately to express the view that the Sixth Amendment Right of Confrontation had relevance to pretrial discovery issues:

> In my view, there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-

> examination of a crucial prosecution witness.

Id. at 61-62 (BLACKMUN, J., concurring).

Justice BLACKMUN'S reasoning hinged on his belief that in a certain cases, "simple questioning will not be able to undermine a witness' credibility and in fact may do actual injury to a defendant's position." *Id.* at 63 (BLACKMUN, J., concurring). Justice BLACKMUN pointed to the specific example of *Davis v. Alaska,* 415 U.S. 308 (1974), where the defense had the juvenile record of a key prosecution witness but was unable to refer to it during cross examination. *Id.* The defense attorney was permitted to question the witness as to bias, but was not allowed to use the file to attempt to point out the reason for that bias. *Id.* at 63-64.

As the *Davis* Court observed, "on the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination." *See id.* (citing 415 U.S. 308, 318 (1974)). In Justice BLACKMUN'S view, the likely reaction of a jury to such a cross examination would be a "sense that defense counsel was doing nothing more than harassing a blameless witness." *Id.* at 63-64 (BLACKMUN, J., concurring).

Ultimately, Justice BLACKMUN stated, "I do not believe, however, that a State can avoid Confrontation Clause problems simply by deciding to

hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage." *Id.* at 64-65 (Blackmun, J., concurring).

This broader view of the Confrontation Clause was also expressed in a dissenting opinion authored by Justice BRENNAN:

> I write separately to challenge the Court's narrow reading of the Confrontation Clause as applicable only to events that occur at trial. That interpretation ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial. In this case, the trial court properly viewed Ritchie's vague speculations that the agency file might contain something useful as an insufficient basis for permitting general access to the file. However, in denying access to the prior statements of the victim the court deprived Ritchie of material crucial to any effort to impeach the victim at trial. I view this deprivation as a

violation of the Confrontation Clause.

This Court has made it plain that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination," *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). "[P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case," *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). The Court therefore has scrupulously guarded against "restrictions imposed by law or by the trial court on the scope of cross-examination." *Delaware v. Fensterer,* 474 U.S. 15, 18, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (*per curiam*).

One way in which cross-examination may be restricted is through preclusion at trial itself of a line of inquiry that counsel seeks to pursue. See *ante,* at ----, n. 9 (citing cases). The logic of our concern for restriction on the

> ability to engage in cross-examination does not suggest, however, that the Confrontation Clause prohibits *only* such limitations. A crucial avenue of cross-examination also may be foreclosed by the denial of access to material that would serve as the basis for this examination. Where denial of access is complete, counsel is in no position to formulate a line of inquiry potentially grounded on the material sought. Thus, he or she cannot point to a specific subject of inquiry that has been foreclosed, as can a counsel whose interrogation at trial has been limited by the trial judge. Nonetheless, there occurs as effective a preclusion of a topic of cross-examination as if the judge at trial had ruled an entire area of questioning off limits.

Id. at 66-70 (BRENNAN, J., dissenting).

Justice BRENNAN went on to note that, "the creation of a significant impediment to the conduct of cross-examination thus undercuts the protections of the Confrontation Clause, even if that impediment is not erected at the trial itself." *Id.* at 71 (BRENNAN, J., dissenting).

Justice BRENNAN ultimately viewed the Confrontation Clause as having "independent significance" in this situations:

> The ability to obtain material information through reliance on a due process claim will not in all cases nullify the damage of the Court's overly restrictive reading of the Confrontation Clause. . . .Therefore, while Confrontation Clause and due process analysis may in some cases be congruent, the Confrontation Clause has independent significance in protecting against infringements on the right to cross-examination."

Id. at 71-72 (BRENNAN, J., dissenting).

Ultimately, whether Mr. Culver's claim that he was entitled to additional photographs of K.W. and her mother is analyzed under the Sixth Amendment or a Fourteenth Amendment due process analysis, Mr. Culver was denied fundamental Constitutional rights when he was denied these additional photographs because the denial of this evidence resulted in an "absence of fundamental fairness essential to the very concept of justice."[8] The Eighth Circuit has recently relied on

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[8] This lack of fundamental fairness is highlighted by the fact that K.W. and her mother both voluntarily submitted to a physical examination and to photographs that were more intrusive and graphic than those sought by the defense for the purpose of inculpating Mr. Culver.

this Honorable Court's "basic test" for denial of due process to conclude that when a medical or psychological examination of an alleged minor victim is sought, then due process requires that, while such testing cannot be compelled, if the trial court cannot devise any way other than additional testing to provide the defendant with a fair trial, the case may have to be dismissed. In reaching its conclusion, the Eighth Circuit noted dismissal would be required if "denial of access would likely result in an absence of 'fundamental fairness essential to the very concept of justice.'" *See United States v. Rouse,* 111 F.3d 561, 567 (8th Cir. 1997) (citing *United States v. Valenzuela-Bernal,* 458 U.S. 858, 872 (1982) for the basic test for denial of due process).

The Eleventh Circuit has also recently dealt with the issue of the use of photographic evidence to prove identity in cases involving alleged sexual offenses. *See United States v. Sarras,* --- F.3d ----, ---- , 2009 WL 2176643 (11th Cir. July 23, 2009). In *Sarras,* the defense had taken photographs of the defendant's penis in order to demonstrate to the jury that the defendant was not the individual depicted in alleged pornographic photographs. *Id.* at *3-4. The prosecution then sought, and was granted, permission to take its own photographs of the defendant's penis. *Id.* at *4-5. At trial, there was considerable controversy over the use of both sets of photographs, with both the prosecution and defense claiming that the other side had manipulated the various penis photographs. *Id.* at *10-11. Ultimately, the trial court allowed both sides vigorous cross examination and development of these issues.

Although the Eleventh Circuit ultimately analyzed the trial court's rulings regarding the photographic evidence as evidentiary issues subject to its discretion, and did not specifically address due process issues, *Sarras* has broader implications; it stands for the proposition that, when the prosecution develops photographic evidence as to identity in a sexual case, a defendant, in fundamental fairness, should be allowed a full opportunity and wide latitude to develop his own evidence to rebut the prosecution. In *Sarras*, both sides were allowed by the trial court to go to great extremes in developing photographic evidence of identity, and Mr. Culver respectfully argues that this is what due process requires.

In Mr. Culver's case, the defense sought, not an invasive physical examination *per se*, but the opportunity to take "additional photographs" of the alleged minor victim and/or her mother, so that those photographs could be used at trial to compare to the Polaroid photographs and stills from the 8mm videotape alleged to depict the minor victim. *See* Trial Transcript, at 165-210. The State of Alabama had already, almost one (1) year after the alleged incidents of November 12, 2003, taken photographs of the alleged minor victim and her mother for the same purpose, and these photographs were available to and used by the State; however, these photographs did not adequately depict the areas the defense needed.[9] *See id.*

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[9] The needed "examination" to procure the defense photographs would have been less lengthy and less invasive than that already conducted by the State of Alabama. *See* Trial Transcript, at 165-210.

Further, the trial court's denial of additional photographs left Mr. Culver in much the same position as the defendants in *Ritchie* and *Davis;* while he was allowed to cross examine K.W. about the absence of marks on her body, because the available photographs did not adequately depict the areas needed for comparison, *effective* cross examination was "foreclosed by the denial of access to material that would serve as the basis for this examination." *See Ritchie,* 480 U.S. at 70 (BRENNAN, J., dissenting). Moreover, because Mr. Culver lacked these additional photographs, "the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination." *See id.,* at 63-64 (BLACKMUN, J., concurring). This increased the likelihood that the jury might have felt that "defense counsel was doing nothing more than harassing a blameless witness." *Id.* at 63-64 (BLACKMUN, J., concurring).

The Sixth Amendment and Fourteenth Amendment require, at the very least, "fundamental fairness" that was denied in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2007-2008

CR-06-0468

Brian Scott Culver

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-2004-341; CC-2004-342)

PER CURIAM.

In March 2004, Brian Scott Culver was indicted by a Jefferson County grand jury for one count of second-degree domestic violence, a violation of § 13A-6-131, Ala.Code 1975; one count of furnishing drugs to a minor, a violation of § 13A-12-215, Ala.Code 1975; and two counts of possession of obscene matter containing a visual reproduction of a

person under the age of 17 years, violations of § 13A-12-192(b), Ala.Code 1975. The jury found Culver guilty of the two counts of possession of obscene matter, but acquitted him of domestic violence and furnishing drugs to a minor. The trial court sentenced Culver to 10 years' imprisonment for each of his convictions, the sentences to run concurrently.

The evidence adduced at trial indicated the following. In November 2003, Culver was living at a residence in Hoover that he shared with his wife, S.B., her son, and her daughter, K.W.,[1] who was then 13 years old. Culver and S.B. had married in February 2003, and Culver was K.W.'s stepfather. Sometime after midnight on November 11, 2003, Culver listened on an extension telephone to a conversation between K.W. and her boyfriend, and he learned that the couple had been sexually active. Culver informed S.B., and she also listened to some of the telephone conversation. Culver and S.B. then confronted K.W. Culver insisted that they speak to the boyfriend and his parents, and he drove to the boyfriend's house at approximately 2:00 a.m. that morning; S.B. and K.W. accompanied Culver. S.B. spoke to the boyfriend's father, and they agreed that they would watch their children more closely and keep in contact with one another.

When S.B., K.W., and Culver returned to the residence, they went into the room next to K.W.'s

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[1] We use initials throughout this opinion for both the juvenile and her mother in order to preserve the juvenile's anonymity. See Rule 52, Ala.R.App.P.

bedroom that the family used as a playroom and as an office. S.B. talked to K.W. about her sexual activities while Culver typed on the computer. S.B. testified that Culver called K.W. a slut and a whore and that he was very angry and agitated. Culver got up from the computer and got a telephone book, looked through it for a telephone number, and then left the house. S.B. and K.W. looked at the computer after Culver left, and they saw that he had been conducting Internet searches for stun guns.

K.W. testified that later that day, sometime during the afternoon, she and Culver were at the residence alone, and she was asleep on the couch. According to K.W., Culver woke her up and gave her two blue pills. K.W. said that Culver told her that she needed to take them because she had a headache. K.W. said that she took one pill and threw the second one into the garbage can in the kitchen.

K.W. said that late that evening, near midnight, she was awakened in her bed by what felt like an electrical shock to her upper back. When she awoke, she discovered that Culver was in bed beside her, beneath the covers. According to K.W., he appeared to be shoving something underneath the pillow when she first saw him in her bed, but she did not see an object. K.W. said that Culver was wearing shorts and a tank top, and that he had a stethoscope around his neck; according to K.W., Culver rubbed her back and told her not to say anything. K.W. then got out of the bed and, when she did, she saw a bag that looked like a shaving kit on the floor beside her bed. K.W. said that she also noticed other items

around her bed, and that she saw Culver pushing those items under her bed. K.W. left her bedroom, went to the kitchen to get a drink of water, and then went to the master bedroom where her mother was sleeping. K.W. told S.B. that Culver had shocked her, but when Culver came into the master bedroom, he denied doing anything to K.W. K.W. testified that she then stated to Culver, " 'Yes, you did. I woke up, and you were beside me, and you hurt me.' " (R. 928.)

Culver and S.B. argued over the incident, and then S.B. and K.W. went to K.W.'s bedroom, where they found several items in a clear box under her bed, including "sex toys," condoms, pornographic magazines, and a vaginal syringe. (R. 929.) K.W. said that her mother pushed the syringe and that Vaseline-brand petroleum jelly and a brown pill came out. According to K.W., she and her mother also found Vaseline on the headboard of K.W.'s bed. K.W. testified that, although he initially denied any involvement, Culver eventually admitted that he had put all of those items in her bedroom. S.B. and Culver continued to argue, K.W. said, and Culver finally told S.B. that he was going to leave. Culver told S.B. that she could stay at the house with her children and that he would move into their house at Smith Lake.

At that point, Culver gathered a variety of items and put them into his vehicle. K.W. said that he put the clear box that had been beneath her bed into his vehicle but that she took it out and hid it in the bushes. After Culver left, S.B. telephoned the police, and several officers came to the residence.

K.W. said that police officers searched the house, photographed her back where she had been shocked, and photographed her hands. When Culver returned to the residence before 6:00 a.m. the following morning with clothing that belonged to S.B. and the children from the house at Smith Lake, the police arrested him on a charge of domestic violence.

During the search of the residence in the early morning hours of November 12, 2003, police officers found seven Polaroid photographs; five of the photographs depicted a female's genitalia and two photographs depicted a male's genitalia. The photographs were found inside two envelopes that had been placed between two books on a bookshelf in the playroom/office located next to K.W.'s bedroom. The Polaroid photographs were later shown to K.W., and K.W. identified herself as the female in the photographs. K.W. stated that she recognized the razor burn on her shaved genital area and that she recognized her hands in the photographs, including her fingernail polish. K.W. also testified that she recognized the sheets depicted in some of the photographs as being sheets that had been used on the bed Culver and her mother shared at their lake house. K.W. testified that her mother had purchased the sheets for Christmas in 2002. The police also showed each of the Polaroid pictures to S.B., and S.B. identified K.W. and Culver in the photographs based on her knowledge of certain of their physical characteristics. S.B. also identified the sheets in the Polaroid pictures as the sheets she had purchased as a Christmas gift for Culver in 2002 and that they kept at the lake house. K.W. testified that she and Culver had stayed at the lake house without S.B.,

and that, on more than one of those occasions, she had gone to sleep on the couch in the lake house and she had awakened in the bed her mother and Culver shared, but she did not know how she got into the bed. K.W. remembered the sheets depicted in the photographs being on the bed on one of the occasions when this occurred.

In addition, when police officers first arrived at the residence, S.B. gave an officer what she described at trial as a vaginal syringe that she had found in K.W.'s room. According to S.B., the syringe contained "KY jelly or petroleum stuff" and a pill. (R. 1369.) The pill S.B. alleged to have found inside the syringe was later determined to be a prescription sleep aid. Also recovered during the search of the residence were adult magazines and a Polaroid camera in a storage room in the attic that was accessed through K.W.'s bedroom. A Raptor-brand stun-gun box was recovered from the master bedroom closet. In the playroom/office next to K.W.'s bedroom, police recovered a bottle of Aleve brand pain reliever that had several blue pills inside. The pills were later tested and determined to be prescription medication, Xanax and Valium. A pill later determined to be Xanax was recovered in the garbage can in the kitchen. K.W. underwent an examination to assist in determining whether she had been sexually assaulted, and samples of her blood and urine were taken. The physical examination revealed no signs of sexual abuse, but test results revealed the presence of the prescription medication Valium in K.W.'s blood.

The police told S.B. to note anything unusual she found in the house and to inform them of anything she found. On November 13, 2003, S.B. turned over to the police an 8mm video camera and a Polaroid camera that she found at the residence. The police conducted a second search of the residence on November 14, 2003, and an 8mm-format videotape was found in a storage room that was accessed through the walk-in closet in the master bedroom. The police officer who found the videotape testified that it had not been in plain view when he entered the storage room, but that he had found the videotape in a corner.

The videotape was played for the jury, and we have reviewed the tape. The first portion of the videotape depicted a female on her back with her legs parted. Only the genitals, which appear to have been shaved, and the uppermost portion of the inner thighs were visible in most of the videotape; a portion of the buttocks and a portion of the lower abdomen were visible in some parts of the videotape, as the camera was repositioned and those portions of the body were filmed. The female's hands were resting motionless above her pubic area, with the fingers slightly curled. Specks of what appear to be fingernail polish were visible. The female was lying on a blue sheet or blanket that had a white imprint. The body appeared to have been covered above the abdominal area. A male's hands are also depicted in the videotape; subject to certain objections he made at trial, Culver stipulated that he was the man depicted in the videotape.

In the first portion of the videotape, Culver first rubbed the female's lubricated vaginal area, and then he digitally penetrated the female's vagina for several minutes. Culver then inserted what appeared to be a plastic vaginal syringe into the female's vagina, and moved the syringe in and out of the female's vagina for several minutes. More digital penetration followed, and at the end of this portion of the videotape, Culver placed a large white, ridged object at the entrance of the female's vagina. Culver repositioned the camera during the filming of this portion of the videotape and he placed his right thumb in front of the lens as he did so. Ridge detail on the thumb was visible. The female was motionless during the videotaping, and she appeared to be unconscious. K.W. viewed a still photograph depicting the female in this portion of the videotape, and she identified herself in the photograph. She recognized her hands and a red spot on one of her fingers. K.W. said she also recognized the sheets in the photograph as those that had been on her mother and Culver's bed at the lake house.

Immediately following this portion of the videotape, a second, shorter, portion of the videotape depicted a nude female body filmed from the back, so that only the female's buttocks and upper thighs were visible. The videotape depicted Culver inserting his fingers into the female's anus and vagina. The female was motionless in this portion of the videotape. K.W. viewed still photographs of the nude female depicted in the second part of the videotape, but she could not identify herself as the female in those photographs.

A freeze-frame photograph of the right thumb that was placed over the lens during the videotape was made, and the image was matched to Culver's thumbprint. Fingerprints were also lifted from the back of one of the Polaroid pictures and from the outside of the 8mm videotape. Subject to objections made at trial, Culver stipulated that all the prints were his.

The parties stipulated that during a search of the lake house, the police recovered a set of blue sheets with a white printed pattern on them. K.W. and S.B. testified that the pattern on those sheets matched the pattern on the sheets in the Polaroid photographs of the female and the sheets in the 8mm videotape.

Photographs of K.W.'s hands were taken on November 13, 2003. Photographs of K.W.'s genitalia, buttocks, and upper thighs, and of S.B.'s genitalia, buttocks, and upper thighs were taken. Photographs of S.B.'s hands were also taken. All of the photographs were admitted into evidence, and the jury was able to compare those photographs with the Polaroid photographs and the 8mm videotape and the still photographs made from that videotape.

I.

Culver contends that the trial court erred when it joined for trial the four charges against him. He argues that the charges of possession of obscene matter [2]should not have been consolidated with the

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[2] Although Culver argued in the trial court that the two charges of possession of obscene matter were duplicitious and that one charge should be dismissed or the two charges should be

charges of domestic violence and distribution of drugs to a minor because, he says, the offenses were not of the same or similar character and because, he says, evidence of one offense would not have been admissible at the trial of the other offenses. He further alleges that "the joinder for trial of 'sex crimes' with 'non-sex crimes' in Mr. Culver's case produced ... ineradicable prejudice ....." (Culver's brief at p. 24.)

We note, first, that the trial court consolidated the four charges for trial before the State filed a motion to consolidate the charges, but after Culver had presented his argument to the trial court that the cases should not be consolidated. Culver argued that consolidation was not permitted under Rule 13.3, Ala.R.Crim.P., because, according to Culver, there was no common scheme or design. He further argued that he would be unfairly prejudiced if any of the cases, other than the two possession-of-obscene-matter cases, were tried together. The trial court determined that evidence from each case would likely be introduced in all the trials, and it consolidated the four cases sua sponte. (C. 102.)

A trial court is vested with substantial discretion in deciding whether to consolidate cases, and its decision as to consolidation will be reversed only for a clear abuse of that discretion. See Snell v.

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consolidated into one charge, Culver acknowledged in the trial court that the two charges could be tried jointly if they were not consolidated. (R. 71, 251, 258.) Culver's argument that he should not have been charged with or convicted of two counts of possession of obscene matter is addressed in Part II of this opinion

State, 677 So.2d 786, 789 (Ala.Crim.App.1995). An appellant who argues that the trial court abused its discretion when it refused to grant a severance must prove "compelling prejudice" before he is entitled to relief. Ex parte Hinton, 548 So.2d 562, 566 (Ala.1989).

> Rule 13.3, Ala. R.Crim. P., provides, in relevant part:
>
> "(c) Consolidation. If offenses or defendants are charged in separate indictments, informations, or complaints, the court on its own initiative or on motion of either party may order that the charges be tried together or that the defendants be joined for the purposes of trial if the offenses or the defendants, as the case may be, could have been joined in a single indictment, information, or complaint."

Rule 13.3(a), Ala. R.Crim. P., provides, in relevant part:

"(a) Offenses. Two or more offenses may be joined in an indictment, information, or complaint, if they:

"(1) Are of the same or similar character; or

"(2) Are based on the same conduct or are otherwise connected in their commission; or

"(3) Are alleged to have been part of a common scheme or plan."

In Lewis v. State, 889 So.2d 623 (Ala.Crim.App.2003), this Court discussed the legal principles relevant to consolidation when Lewis argued on appeal that the trial court had erred when it consolidated capital and noncapital indictments for trial. This Court stated:

"In Yelder v. State, 630 So.2d 92 (Ala.Crim.App.1991), rev'd on other grounds, 630 So.2d 107 (Ala.1993), this Court stated:

> " ' "Joinder, and thus consolidation, is appropriate where the crimes are of similar character, meaning nearly corresponding, resembling in many respects, or having a general likeness. United States v. Werner, 620 F.2d 922, 926 (2d Cir.1980)." Ex parte Hinton, 548 So.2d 562, 566 (Ala.1989). The question is whether the offenses are of a same or similar character so that a person evaluating the crimes would believe that the offenses were committed by the same person. See King v. State, 518 So.2d 880 (Ala.Cr.App.1987). Perhaps the most important consideration is the answer to the following question: If the offense[s] were tried separately, would evidence of each offense be admissible in the trial for the other offense? See Nickerson v. State,

> 523 So.2d 504 (Ala.Cr.App.1987); King, supra.'

"630 So.2d at 96. Moreover,

> " '[T]he "common scheme or plan" provision of Rule 13.3 is limited by the "common scheme or plan" exception to the rule excluding collateral crimes evidence. That is, multiple offenses alleged to have been committed by the same defendant may not be consolidated and tried jointly under the "common scheme or plan" provision of Rule 13.3 unless evidence of each offense would be admissible, under the "common scheme or plan" exception to the collateral crimes exclusionary rule, at a separate trial of the other offense. See King v. State, 518 So.2d [880,] 884 & n. 2 [(Ala.Crim.App.1987)]; Ex parte Hinton, 548 So.2d [562,] 566 [(Ala.1989)].'

" Kennedy v. State, 640 So.2d 22, 29 (Ala.Crim.App.1993). Thus, consolidation in this case was proper only if evidence of each offense would be admissible at a separate trial of each of the other offenses.

> " 'On the trial for the alleged commission of a particular crime, evidence of the accused's having committed another act or crime is not admissible if the only probative function of such evidence is to prove bad character and the accused's

> conformity therewith. This is a general exclusionary rule which prevents the introduction of prior acts or crimes for the sole purpose of suggesting that the accused is more likely to be guilty of the crime in question. This rule is generally applicable whether the other crime or act was committed before or after the one for which the defendant is presently being tried....
>
> " '....
>
> " 'The foregoing exclusionary rule does not work to exclude evidence of all crimes or acts, only such as are offered to show the defendant's bad character and conformity therewith on the occasion of the now-charged crime. If the defendant's commission of another crime or misdeed is relevant for some other material purpose in the case then it may be admitted.'

"C. Gamble, McElroy's Alabama Evidence § 69.01(1) (5th ed.1996) (footnotes omitted). The other purposes for which collateral-crimes evidence may be admissible, i.e., the exceptions to the exclusionary rule, include:

> " ' "(1) Relevancy to prove physical capacity, skill, or means to commit the now-charged crime; (2) part of the res gestae or part of a continuous transaction; (3) relevancy to prove scienter or guilty

> knowledge; (4) relevancy to prove criminal intent; (5) relevancy to prove plan, design, scheme, or system; (6) relevancy to prove motive; (7) relevancy to prove identity; (8) relevancy to rebut special defenses; and (9) relevancy in various particular crimes." '
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> " Nicks v. State, 521 So.2d 1018, 1026 (Ala.Crim.App.1987), aff'd, 521 So.2d 1035 (Ala.1988), quoting Nelson v. State, 511 So.2d 225, 233 (Ala.Crim.App.1986), aff'd, 511 So.2d 248 (Ala.1987). These exceptions do not apply unless 'there is a real and open issue as to one or more of those "other purposes." ' Bowden v. State, 538 So.2d 1226, 1227 (Ala.1988). Furthermore, the common plan, scheme, or design exception is 'essentially coextensive with the identity exception,' Ex parte Darby, 516 So.2d 786, 789 (Ala.1987), and 'applies only when identity is actually at issue.' Campbell v. State, 718 So.2d 123, 128-29 (Ala.Crim.App.1997)."

889 So.2d at 660-61.

In Summerlin v. State, 594 So.2d 235 (Ala.Crim.App.1991), this Court held that no error had occurred when the trial court refused to sever arson charges from assault and sexual-abuse charges. Summerlin had threatened to harm his former roommate, J.E., a woman who was at that time living with another man, James Fillmon, and he had threatened to kill Fillmon. A few days later, Summerlin cut J.E. and touched her vaginal area. A few evenings later, the mobile home Fillmon and J.E. were sleeping in was burned, and the fire was determined to have been caused by an accelerant.

This Court determined that the offenses were properly tried together because they were connected and that Summerlin had failed to show that he suffered any specific or compelling prejudice as a result of the joinder. This Court also noted that Summerlin was acquitted of the arson charge and that the jury could easily separate the evidence of separate crimes.

In Snell v. State, 677 So.2d 786 (Ala.Crim.App.1995), Snell was charged with enticing a child to enter a house for immoral purposes and with two counts of sodomy. Snell allegedly enticed a minor child to come into his house using pornographic movies and attempted to convince the minor child to allow him to have oral sex with her. The minor child testified that Snell performed oral sex on her twice. Snell argued on appeal that the trial court had erred when it denied his motion to sever the enticement charge from the sodomy charges. This Court in Snell discussed the facts and the severance issue decided in Summerlin, supra, and held that "the enticement charge was even more closely connected with the sodomy charges than the arson charge was connected to the sexual abuse and assault charges in Summerlin." Snell, 677 So.2d at 789. The Court also stated that no prejudice results from consolidation when the jury can easily separate the evidence of the separate crimes. See id. "Clearly," the Court said, "the jury separated the evidence of the separate crimes, as evidenced by the fact that it convicted Snell of the offense of sodomy, but not the offense of enticement." 677 So.2d at 789-90. The Court held that the trial court had not

abused its discretion when it refused to sever the enticement charge from the sodomy charges.

Here, the evidence indicated that during the afternoon before K.W. awoke to find Culver in bed with her, Culver gave K.W. two blue pills, one of which she ingested. The prescription drug Valium was later found in K.W.'s blood. K.W. testified that Culver shocked her with something later that night, after he had gotten into bed with her while she was asleep. Culver was wearing a stethoscope, and sexual devices and pornographic magazines were found underneath K.W.'s bed. The 8mm videotape recovered in a search of the house the following day depicted an apparently unconscious K.W. being sexually assaulted by Culver on a bed with blue and white sheets, and the Polaroid photographs discovered on the night Culver was arrested appeared to depict K.W. in a position similar to the position on the videotape and on a bed made up with the same sheets. K.W. testified that she recalled waking up at the lake house in the master bedroom on the blue and white sheets, even though she had fallen asleep on the couch. Based on this evidence, the State's theory was that Culver had previously given drugs to K.W. to render her unconscious so that he could sexually assault her and so that he could videotape and photograph her genitalia as he did so, and that when Culver gave K.W. drugs and later got into bed with her on November 12, 2003, he intended to incapacitate her and abuse her further.

The charged crimes were clearly connected in their commission and were part of a common plan or

scheme, and the evidence in the cases overlapped. In addition, evidence of each crime would have been admissible at separate trials as part of the res gestae and to establish motive. Based on our review of the relevant legal principles and on the circumstances surrounding the charges, we hold that the trial court did not abuse its discretion when it consolidated the cases for trial.

We note that Culver argues that the "common plan or scheme" rationale did not support the consolidation of the cases for trial because, he says, his identity was never genuinely at issue. However, the record reveals otherwise. During a pretrial hearing on the propriety of consolidation of the four charges, Culver argued that there was no question of identity so far as the State was concerned, because the State had always alleged that Culver was the perpetrator. When the trial court asked Culver if he was agreeing with that, however, Culver stated, "No, ma'am, I am not. I'm not agreeing to it at all. But that is their position." (R. 66.) During the trial, Culver argued to the trial court that it should not allow testimony that his thumbprint had been identified as the print filmed on the videotape, stating: "At this time, the defendant is not saying whether that is or is not him on that videotape." (R. 1607.) Thus, Culver placed his identity at issue before and during trial. Furthermore, as discussed above, the cases were properly consolidated for reasons other than that they were part of a common plan or scheme. Specifically, as the prosecutor argued during a pretrial hearing, evidence of each crime would have been admissible in the trials of the

other crimes as evidence of motive and as part of the res gestae. (R. 88-89.)

Finally, we note that the jury found Culver not guilty of the offenses of domestic violence and furnishing drugs to a minor. He was convicted only of possessing obscene matter depicting a child under the age of 17 years. Thus, Culver's argument that he was prejudiced by the joinder of "sex crimes" with "non-sex crimes" is clearly refuted by the record. The jury was most certainly able to separate the evidence of the four crimes because it convicted Culver only of the crimes involving possession of obscene matter. Culver has failed to establish that he suffered specific and compelling prejudice as a result of the consolidation of the cases for trial. Therefore, Culver is not entitled to any relief on this claim of error.

II.

Culver also contends that the trial court erred when it refused to consolidate the two possession-of-obscene-matter charges into a single charge or to dismiss one of the charges because, he says, he should not have been charged separately for possession of the 8mm videotape and for possession of the Polaroid photographs. Because he was convicted twice for a single offense, Culver argues, the prohibition against double jeopardy was violated and one of the convictions and sentences must be set aside. Culver raised this issue in pretrial motions, and the parties presented extensive arguments on the issue. The trial court denied Culver's motions to consolidate the possession charges into one charge or to dismiss one of the possession charges, and it

submitted both charges to the jury. The court determined that because the charges were based on different media-a videotape and a series of photographs-two charges of possession were proper. The jury found Culver guilty of both charges, and the trial court imposed sentences on both convictions.

Culver argues on appeal, as he did in the court below, that Girard v. State, 883 So.2d 714 (Ala.Crim.App.2002), aff'd, 883 So.2d 717 (Ala.2003), limited the State to charging him with only one count of possession of obscene matter because the "unit of prosecution" as defined in Girard was the simultaneous possession of a collection of obscene material, even though the collection contained multiple pieces of obscene matter. The State argues that Culver is not entitled to relief based on this Court's holding in Girard, because, it says, the police found the 8mm videotape and the Polaroid photographs on different days and in different locations inside Culver's residence and that, therefore, each charge was based on a separate act of possession.

Section 13A-12-192(b), Ala.Code 1975, the statute under which Culver was indicted, provides that "[a]ny person who knowingly possesses any obscene matter containing a visual reproduction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual conduct shall be guilty of a Class C felony." At the time of Culver's actions, § 13A-12-190(12), Ala.Code 1975, defined "matter" as "[a]ny book,

magazine, newspaper, or other printed material, or any picture, photograph, motion picture or electrical or electronic reproduction, or any other articles or materials that either are or contain a photographic or other visual reproduction of a live act, performance, or event." [3]

In Girard, supra, Girard was charged with 26 counts of possession of obscene matter under § 13A-12-192(b), Ala.Code 1975, because "numerous downloaded images and videos of underage boys" were discovered on the hard drive of his computer and on a computer disk. 883 So.2d at 714-15. Some of the files contained multiple images, and the possession of each file was charged as a separate crime. Girard argued in the trial court that he should have been charged with only one count of possession of obscene material, and that the remaining counts were duplicitous. The trial court granted Girard's motion for a judgment of acquittal as to several counts, and he was convicted for 10 counts of possession. On appeal, after noting the well-established principle that a single crime cannot be prosecuted as multiple offenses, this Court stated that, to determine whether double-jeopardy principles were violated when Girard was convicted

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[3] The legislature amended the definition of "matter" in § 13A-12-190(12) effective June 1, 2006. The definition now reads: "Any book, magazine, newspaper, or other rinted material, or any picture, photograph, motion picture, video cassette, tape, record, digital video disc (DVD), video compilation, or electronic depiction in a comparable format, or an image, file, download, or other content stored, or reproduced by using a computer or electronic device or other digital storage, or any other thing, articles, or materials that either are or contain a photographic or other visual depiction of a live act, performance, or event."

of and sentenced for multiple counts of possession, the correct unit of prosecution had to be defined. 883 So.2d at 715-16. This Court then noted that it had addressed Girard's argument regarding multiple prosecutions previously, though only in dicta:

> "In Harris v. State, 563 So.2d 9 (Ala.Crim.App.1989), the defendant was indicted for four counts of possession of obscene material, violations of § 13A-12-192(b), Ala.Code 1975. Harris filed a ' "motion to dismiss the indictment as being multiplicitous, or in the alternative, motion to compel an election by the State as to the count it intends to prosecute." ' 563 So.2d at 9. The trial court denied the motion, and Harris subsequently pleaded guilty and received concurrent sentences of five years in prison. The Court of Criminal Appeals held that Harris had waived this argument by pleading guilty subsequent to the denial of his motion, but continued:
>
> > " 'Harris was charged in a four-count indictment with four separate violations of § 13A-12-192(b). Count one alleged the possession of a pornographic magazine. Counts two, three, and four each involved the possession of a different video cassette tape. Harris contends that he should have been convicted and sentenced

for only one offense, because the magazine and cassette tapes were seized from his residence on the same occasion. We recognize that this argument may have considerable merit. See United States v. Meyer, 602 F.Supp. 1480, 1480-81 (S.D.Cal.1985) (the appropriate unit of prosecution for offenses of transportation of material involving sexual exploitation of children and importation of obscene material, arising from defendant's transporting several photographs in one binder, was one count for each offense, rather than one count for each photograph for each offense); Braunstein v. Frawley, 64 A.D.2d 772, 407 N.Y.S.2d 250, 253 (1978) ("[t]he promotion or possession of more than one item at the same time and on the same date constitutes one crime, and cannot be split into as many crimes as there are items"); State v. Smith, 323 N.C. 439, 373 S.E.2d 435, 438 (1988) ("[o]ther courts have similarly held that a single transaction involving obscene materials constitutes but one offense"). See also United States v. Kinsley, 518 F.2d 665 (8th Cir.1975) (possession of firearms); Vogel v. State, 426 So.2d 863, 878-

> 82 (Ala.Cr.App.1980), affirmed, 426 So.2d 882 (Ala.1982), cert. denied, 462 U.S. 1107, 103 S.Ct. 2456, 77 L.Ed.2d 1335 (1983) (possession of drugs); Owens, Alabama's Minority Status: A Single Criminal Act Injuring Multiple Persons Constitutes Only a Single Offense, 16 Cum. L.Rev. 85, 105-06 (1985) (discussed in McKinney v. State, 511 So.2d 220 (Ala.1987)). However, this issue has not been preserved for review.'

"563 So.2d at 10."

883 So.2d at 716-17 (emphasis added).

This Court held in Girard that the unit of prosecution was "the simultaneous possession of a collection of obscene material," and that Girard was guilty of only one count of possession. Girard, 883 So.2d at 717. The Court reversed the trial court's judgment and remanded the cause for the trial court to vacate all but one of Girard's convictions and sentences. The Court explained:

> "The act rendered illegal by the statute-the possession of any obscene matter, even if the possession is of multiple pieces of obscene matter-is simultaneous and inseparable, more like the simultaneous, single act of transportation or importation of multiple pieces of obscene matter, see United States v. Meyer, 602 F.Supp. 1480

> (S.D.Cal.1985), than the separate transactions involved in the distribution of multiple pieces of obscene matter, see King v. State, 674 So.2d 1381 (Ala.Crim.App.1995)."

Girard, 883 So.2d at 717 (footnote omitted).

The Alabama Supreme Court affirmed this Court's judgment and, in doing so, quoted extensively from this Court's opinion. See Girard v. State, 883 So.2d 717 (Ala.2003). The State had argued in its petition for the writ of certiorari that the Alabama Legislature had clearly indicated in the statute prohibiting the possession of child pornography that the unit of prosecution was each obscene image, regardless of the medium in which the image was stored. However, the Alabama Supreme Court rejected the State's argument:

> "The State cites King v. State, 674 So.2d 1381 (Ala.Crim.App.1995), in support of its argument. In King, the Court of Criminal Appeals held that § 13A-12-200.2(1), Ala.Code 1975, part of the Alabama Anti-Obscenity Enforcement Act, authorizes the prosecution of each distributed item that qualifies as obscene material pursuant to the statute. The court explained that '[e]very item listed' in the statute's definition of 'material' 'is singular' and that '[i]f the legislature intended for violations based on transactions instead of individual items distributed, it could have indicated that

each item ... could also be plural.' 674 So.2d at 1383. The State argues in its brief that '[t]he court based its holding on its interpretation of the term "material" in Ala.Code [1975,] § 13A-12-200.1(2),[2] which is analogous to the term "matter" in the child pornography statute in Ala.Code [1975,] § 13A-12-190(12).' Section 13A-12-190(12) defines 'matter' as:

> " 'Any book, magazine, newspaper, or other printed material, or any picture, photograph, motion picture or electrical or electronic reproduction, or any other articles or materials that either are or contain a photographic or other visual reproduction of a live act, performance, or event.'

"As opposed to the definition of material found at § 13A-12-200.1(15), Ala.Code 1975,[3] and discussed in King, supra, the definition of matter at § 13A-12-190(12), Ala.Code 1975, does include the plural of some terms. Also the statute at issue in this petition, § 13A-12-192, criminalizes the possession of obscene matter, while the statute at issue in King, § 13A-12-200.2, criminalized the distribution of obscene material.

"

"[2]That definition now appears at § 13A-12-200.1(15), Ala.Code 1975.

"[3]Section 13A-12-200.1(15), Ala.Code 1975, defines 'material' as:

> " 'Any book, magazine, newspaper, printed or written matter, writing, description, picture, drawing, animation, photograph, motion picture, film, video tape, pictorial representation, depiction, image, electrical or electronic reproduction, broadcast, transmission, telephone communication, sound recording, article, device, equipment, matter, oral communication, live performance, or dance.' "

883 So.2d at 722.

The Alabama Supreme Court also noted that "other statutes that address the crime of possession criminalize the act of possession, regardless of how many items the offender actually possessed." 883 So.2d at 722. By way of example, the Court quoted § 13A-7-8, Ala.Code 1975 (possession of burglar's tools), § 13A-7-44, Ala.Code 1975 (criminal possession of explosives), and § 13A-7-28, Ala.Code 1975 (criminal possession of noxious substances). The Court noted that the foregoing statutes and § 13A-12-192(b), Ala.Code 1975, were similar in that they criminalized possession of "any" of the items mentioned in the statute. The Court then noted:

"[I]n McKinney v. State, 511 So.2d 220, 224 (Ala.1987), this Court explained that 'legislative intent to allow multiple prosecutions for a single act that injures more than one person is determined by the "description of the unit of prosecution within the substantive criminal law statutes." ' (Quoting R. Owens, Alabama's Minority Status: A Single Criminal Act Injuring Multiple Persons Constitutes Only a Single Offense, 16 Cum.L.Rev. 85, 104 (1985-86).) This Court then quoted the following from Owens:

> " ' "How, then, should the unit of prosecution be described so that an intent to allow multiple convictions is clear and unequivocal? Instead of using the word 'any' to describe the unit of prosecution, the singular words 'a' or 'another' should be used. An examination, then, should be made of the Alabama Criminal Code to see how the unit of prosecution is described. This examination will disclose whether the code allows multiple convictions.
>
> " ' "A review of the criminal code discloses that there are basically four categories into which the statutes can be divided.... The second category contains statutes

> in which the unit of prosecution is described with the word 'any'; based on the above mode of statutory construction, only one conviction should be allowed." '
>
> "511 So.2d at 224-25 (quoting Owens, 16 Cum. L.Rev. at 105-06)."

883 So.2d at 723. The Court then concluded that the unit of prosecution in § 13A-12-192(b), Ala.Code 1975, the statute under which Culver was also convicted, was the single act of possession, "regardless of how many items [were] actually possessed." 883 So.2d at 723.[4]

Based on the foregoing, we must conclude that Culver's argument is well-taken. Despite the fact that Culver was found to be in possession of a series of photographs and in possession of a videotape, the trial court erred when it determined that the possession of these items permitted two separate charges and convictions for possession of obscene matter based solely on the fact that the obscene matter was on different media. The State's assertion that Culver was properly charged with two counts of possession because the videotape and the photographs were found on different days is also not persuasive. The evidence shows that Culver's possession of the obscene items was simultaneous, even though the police did not find the videotape

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[4] We note that other states have adopted a different interpretation of the word "any" in child-pornography statutes. See, e.g., Commonwealth v. Davidson, 938 A.2d 198 (Pa.2007), and the cases cited therein.

until they conducted the second search of the residence, a few days after the initial search when they found the photographs. Culver remained in custody after he was arrested outside the residence shortly after the initial search, and he had no access to the residence before the videotape was found. That the police did not locate the videotape during the initial search did not somehow create a second crime of possession of obscene matter based on the subsequent discovery of the videotape. Under current Alabama law, Culver committed only a single criminal act when he possessed both forms of obscene material. Therefore, we have no choice but to reverse the trial court's judgment and remand the cause for the trial court to vacate one of the convictions and corresponding sentence against Culver.

III.

Culver also contends that the trial court erred when it refused either to order the State to disclose K.W.'s medical records to him or to examine the records in camera to "uncover evidence that [K.W.], despite alleging she was subjected to sexual acts by Mr. Culver involving large amounts of lubrication, never complained of any problems of residual wetness with her 'private areas.' " (Culver's brief at p. 29.) The State argues that any evidence in K.W.'s medical records has no relevance to Culver's convictions for possession of obscene matter and that because Culver was acquitted of the remaining charges, the trial court's ruling on this issue is not subject to appellate review.

The record reflects that Culver filed a pretrial motion seeking medical records for K.W. from all physicians who had examined her "for any medical condition in the last three years ...." (C. 126-27.) During a hearing on that motion, Culver argued that the State had alleged that he had given K.W. drugs or had inserted them into her vagina by using a lubricant, and that the medical records "should show any suggestion of any intrusions anatomically" and whether she had experienced any problems when she woke up in the mornings. The trial court denied the motion. (C. 102.) Culver's request for medical records was clearly related to the charges of furnishing drugs to a minor, and he was acquitted of that charge. " ' "The charge upon which the conviction rests is the only charge that is subject to appellate review." ' " Flowers v. State, 922 So.2d 938, 957 (Ala.Crim.App.2005), quoting Allen v. State, 683 So.2d 38 (Ala.Crim.App.1996), quoting in turn, McCain v. State, 611 So.2d 1123, 1124 (Ala.Crim.App.1992). Thus, the trial court's ruling on this issue is not subject to appellate review.

We note, moreover, that during cross-examination, Culver asked K.W. if she had ever claimed that she had awakened in the master bedroom in the lake house "all full of Vaseline," and K.W. testified that she had never said that. (R. 1054.) Even without the medical records, Culver was able to place before the jury the evidence that he sought from the medical records. Therefore, Culver is not entitled to review of, or relief on, this claim of error.

IV.

Culver contends that the trial court erred when it refused to order physical examinations and additional photographs of K.W. and S.B. so that he could obtain additional photographs of their buttocks and upper thighs so that he could attempt to prove that it was the back of S.B.'s body that was depicted in the second portion of the 8mm videotape. Culver alleges that he demonstrated to the trial court the extreme necessity required to warrant the additional physical examination and photographs of K.W. and of her mother. Culver raised this issue in the trial court, and the parties argued the issue extensively. The court denied Culver's request for additional photographs, finding that the photographs of K.W. and her mother that had already been taken were adequate to show the buttocks and upper thigh areas of the women for comparison purposes.

Culver's argument about the necessity for additional examinations and photographs is premised on his argument that the woman depicted in the second portion of the 8mm videotape, the woman whose back was to the camera as she was penetrated vaginally and anally, was S.B., and not K.W. Culver argued throughout the proceedings in the trial court, and he continues to argue on appeal, that the first woman depicted in the videotape and woman depicted in the Polaroid photographs were the same person. The State presented evidence indicating that K.W. was depicted in the videotape and the photographs and that Culver was in possession of those materials. Culver's assertion that the videotape depicted two women and not one, and that the woman in the second portion of the

videotape was S.B., is irrelevant to his possession convictions. That S.B. or some other woman was depicted in the second portion of the videotape, even if true, would not have been exculpatory evidence. Therefore, Culver failed to establish any necessity, and certainly no extreme necessity, for additional physical examinations and photographs.

Lanton v. State, 456 So.2d 873 (Ala.Crim.App.1984), on which Culver relies, stands for the proposition that a trial court in a sex-crime case has the discretion to order a physical examination of the prosecutrix when the defendant establishes extreme necessity for the examination, and that the trial court's ruling on the matter will not be reversed unless the ruling constitutes an abuse of that discretion. We find no abuse of the trial court's discretion here. The record establishes that the court carefully reviewed the photographs of K.W. and S.B. that had already been taken, considered Culver's arguments in favor of the additional examination and photographs, and determined that the photographs that had already been taken adequately displayed the areas of the women's bodies for comparison purposes. We find no abuse of the trial court's discretion.

Finally, we note that in her testimony at trial, K.W. testified that she could not identify herself in the still photograph of buttocks that were taken from the second portion of the videotape. Thus, to the extent Culver believed it was relevant to his defense to establish that the videotape depicted two women,

K.W.'s testimony permitted the jury to make that inference.

For the foregoing reasons, we hold that the trial court did not abuse its discretion when it denied Culver's request for physical examinations and additional photographs of S.B. and K.W.

V.

Culver next contends that the trial court erred when it refused to disclose to him the identity of any individuals, other than K.W.'s stepbrother, about whom Culver was aware, against whom K.W. had made allegations of sexual improprieties. He argues that the trial court should have disclosed the names of any other individuals K.W. had accused of improper sexual activity so that he could investigate whether K.W. had engaged in a common plan or scheme to falsely accuse people of sexual misconduct.

Culver's request for the names of any other individuals K.W. had allegedly accused of sexual improprieties was related to the charges of domestic violence and distributing drugs to a minor, and whether K.W. had accused other people of coming into her room, drugging her, and assaulting her, as it had been alleged Culver had done. Thus, as the State correctly argues, this issue is not related to the charges for which Culver was convicted, and it is not subject to appellate review. See Flowers v. State, 922 So.2d 938, 957 (Ala.Crim.App.2005).

VI.

Culver contends that the trial court erred when it admitted into evidence photographs of adult magazines and videotapes that were recovered during the initial search of Culver's residence because, he argues, the evidence was irrelevant and prejudicial. Specifically, Culver argues that the jury might have been confused or misled into believing that the adult materials indicated that he had deviant sexual appetites, which, he claims, would have prejudiced his defense against the charges that he was in possession of obscene materials depicting a person under the age of 17 years. He also objects to the "staging" of the scene that resulted when the adult magazines were photographed on K.W.'s bed, even though they had not been found on her bed. (Culver's brief at p. 37.)

Culver does not list in his brief to this Court the exhibit numbers for the photographs he now argues were erroneously admitted. Rather, he merely cites to several pages of the record where the adult materials were discussed during the testimony of various witnesses. We have examined those portions of the record, and we have determined that Culver failed to object to the testimony that adult magazines were found in the attic and placed on K.W.'s bed for the photographs (R. 932, 1173-74) and that he failed to object to the testimony about the recovery of a canvas bag that contained adult material. (R. 1184-85). Furthermore, the photographic exhibits about which the witnesses testified, and that we understand to be those to which Culver now objects, were admitted into evidence without objection at trial. (R. 1135, 1185.) By failing to object to the photographs when they were offered and admitted,

Culver has waived appellate review of this argument. See, e.g., Shouldis v. State, 953 So.2d 1275, 1284 (Ala.Crim.App.2006) (holding that to preserve an alleged error in the admission of evidence, "a timely objection must be made to the introduction of the evidence, specific grounds for the objection should be stated, and a ruling on the objection must be made by the trial court").

Moreover, we note that, during his closing argument to the jury, defense counsel argued, "S.B. and Brian Culver are some perverted people. They have got some fetishes and some wild ideas about how to do things." (R. 2453.) Thus, Culver's argument that the admission of photographs depicting adult magazines and videos might have prejudiced him by misleading the jury into believing that he had deviant sexual appetites is inconsistent with defense counsel's argument at trial that he did, in fact, have such deviant sexual interests.

Therefore, Culver is not entitled to review of, or relief on, this claim of error.

VII.

Culver contends that the trial court erred when it admitted into evidence the 8mm videotape because, he argues, the State failed to authenticate the videotape and to prove that it was the same videotape as the one seized from Culver's residence. Specifically, Culver argues that the videotape admitted at trial was not the original videotape taken from the residence, because that tape did not have any traces of black magnetic fingerprint powder

even though the State had processed the original videotape for fingerprints, and because the tape admitted at trial had a sticker labeled "copy" on it. Thus, Culver says, the videotape had been mishandled and the State failed to prove a proper chain of custody.

This argument was not preserved for review. Although Culver raised this issue in the trial court and the parties presented testimony on the issue at a hearing, at the conclusion of that hearing, Culver's counsel stated:

> "Judge, I've been doing this long enough to know what motion hearings are and what I have heard in the way of evidence. Let me say this: I realize that we currently have a difference of opinion about some of these fingerprint exhibits and about whether evidence was spoliated and things of that nature. And I would anticipate that the Court would, at this point, have no choice but to deny my motion as to those things. And the Court would have to say you believe it is a jury question, a right for cross-examination, but not something that is going lead for you [sic] to exclude this evidence. Having heard that evidence, I am smart enough to know that, and I don't want to waste the Court's time."

(R. 539-40.) Thus, Culver abandoned his initial objections to the admissibility of the videotape. Moreover, when the videotape was offered into

evidence during the trial, Culver did not object, and the videotape was admitted into evidence. (R. 1760.) [5] Thus, Culver has failed to preserve for this Court's review any arguments about the admissibility of the videotape. See, e.g., Shouldis v. State, 953 So.2d 1275, 1284 (Ala.Crim.App.2006).

VIII.

Culver next contends that the trial court erred when it denied his motion for a mistrial on the ground that a witness for the State violated the trial court's in limine order when he testified about numerous drugs that were collected from the Culver residence and submitted for forensic testing, and when he mentioned the "Cullman County investigation." (Culver's brief at p. 41.) Culver argues that the trial court's curative instruction was insufficient to eradicate the prejudice that resulted from the witness's testimony.

"The grant or denial of a mistrial is a matter within the sound discretion of the trial court, and its ruling will be disturbed only if an abuse of that

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[5] We also note that later during the trial, Culver argued that the fingerprint lifted from the exterior of the 8mm videotape should not be admitted and testimony that it was his fingerprint should not be allowed because, he said, the State had failed to prove that the videotape from which the print was lifted was the original videotape seized from his residence. The trial court considered testimony and arguments presented on the issue of the admissibility of the fingerprint lift and identification and overruled Culver's objections. During its consideration of Culver's motion, the court stated that the videotape had been admitted "long ago" and that the court had only reserved ruling on the fingerprint. Culver stated, "I think that's correct, Your Honor." (R. 2282.)

discretion is shown." J.E. v. State, [Ms. CR-05-1641, April 27, 2007] --- So.2d ----, ---- (Ala.Crim.App.2007). To be timely, a motion for a mistrial must be made immediately after the grounds alleged to warrant the mistrial become apparent. E.g., Garner v. State, 977 So.2d 533 (Ala.Crim.App.2007); Cooper v. State, 912 So.2d 1150, 1159 (Ala.Crim.App.2005).

During redirect examination of Detective Darren McGairty, the lead investigator in the case, the State asked Det. McGairty what items he had submitted to the Department of Forensic Sciences ("DFS"). Det. McGairty listed 42 items he had submitted to DFS, including various drugs, and that testimony comprises more than 2 pages of the record. (R. 1919-21.) After Det. McGairty completed his answer, the State asked another question, which Det. McGairty also answered. Only then did Culver state, "Your Honor, just for the record, we would like to make a motion later that would be timely." (R. 1920-21.) The trial court replied, "All right." (R. 1921.) The State continued its redirect examination of Det. McGairty. The State asked Det. McGairty if he was the only person who had submitted items to DFS for testing, and Det. McGairty testified that he was not the only person. The State noted that defense counsel in his cross-examination had asked Det. McGairty about "some massagers and items that I believe you testified were found in Cullman County," and asked Det. McGairty if he took those items to DFS. (R. 1921.) Det. McGairty replied, "No, I did not. Their investigators would have done that." (R. 1921.) Culver did not object to the State's question, and he did not request that the court strike Det. McGairty's answer. The State then asked Det.

McGairty if he was aware of whether any syringes had been submitted to DFS, other than the one S.B. had given to the police on the night of the incident. Culver then asked to approach the bench.

Outside the presence of the jury, Culver first stated that he had requested during the State's questioning of Det. McGairty to make an objection later and to have it be considered timely, and he argued that the State had violated the court's in limine order by eliciting testimony about "all of these pills." (R. 1924.) He then argued that the State had violated the court's in limine order that the State not mention "the cases pending in Cullman County, Alabama," by twice making reference to Cullman County investigators. (R. 1924.) He requested that the court inform the jurors that all charges that had been filed against him in Cullman County had been dismissed and that those charges should not be considered as evidence against him. "[B]arring that," Culver argued, "we have to ask for a mistrial in this case because of that." (R. 1925.) In response, the State argued that Culver had opened the door to questions about the items taken to DFS because he had questioned Det. McGairty extensively during his cross-examination about the results of the DFS report, and he had elicited testimony about Cullman County investigators by asking questions about the search in Cullman County. Culver then again moved for a mistrial, and the trial court took the matter under advisement until the following day. The trial court denied the motion for a mistrial when the trial proceedings reconvened. The trial court instructed the jury that it had previously ruled that the list of items sent to DFS was not relevant, and that the

jury was to consider only relevant evidence. The jury stated that it could follow the court's instructions and consider only relevant evidence. (R. 1940.) The court then instructed the jury that Cullman County investigators had been mentioned in the previous day's testimony because "when one jurisdiction goes into the police jurisdiction of another county or city, they take investigators from that jurisdiction with them." (R. 1940-41.) The court further instructed the jury that some items of evidence had been removed from the lake house in Cullman County and had been submitted to DFS and that Cullman County investigators were involved for that reason. Culver did not object to the court's curative instructions.

Culver's motion for a mistrial as to Det. McGairty's testimony about the drugs submitted to DFS was clearly related to the charges of furnishing drugs to a minor, and Culver was acquitted of that charge. Thus, the trial court's ruling on that issue is not subject to appellate review. See Flowers v. State, 922 So.2d 938, 957 (Ala.Crim.App.2005).

Furthermore, Culver's motion for a mistrial was untimely, and his arguments regarding the items submitted to DFS for testing would not have been preserved for appellate review, even if the issue was subject to appellate review. Although Culver asked the trial court to be permitted to make a motion later and to have it considered timely, this request came after Det. McGairty had already testified, without objection from Culver, about a lengthy list of items that had been submitted to DFS, and had been asked and had provided an answer to

yet another question. Culver's subsequent objection to testimony about the items submitted to DFS was made well after the grounds for the motion became apparent. Therefore, the portion of the motion for a mistrial related to testimony about items submitted to DFS for testing is not properly before this Court for review.

Similarly, Det. McGairty testified without objection that investigators from Cullman County had submitted to DFS items that had been taken during the search in Cullman County. Culver objected only later, when Det. McGairty testified that "Cullman County had a syringe" and that investigators had submitted that syringe to DFS. (R. 1922.) Because Culver failed to object following Det. McGairty's initial testimony about Cullman County investigators, the jury had already heard testimony about those investigators, and Culver's motion for mistrial as to that testimony was also untimely.

Based on the foregoing, this issue is not properly before this Court for our review.

IX.

Culver contends that the trial court erred when it allowed into evidence testimony that a thumbprint filmed on the 8mm videotape had been identified as Culver's. Culver argues that the testimony about procedures used to "capture" the image of the thumbprint from the videotape did not meet the requisite standards of reliability and that the testimony was inadmissible.

Culver filed a motion to suppress testimony that his fingerprint had been identified from an image that appeared on the 8mm videotape. He argued that law-enforcement personnel had captured an image of a thumbprint that had been filmed on the 8mm videotape and had enhanced the print and determined that it was Culver's. He argued that the procedures used by the law-enforcement personnel who obtained the image of the thumbprint from the videotape did not meet the standards recommended by the Scientific Working Group on Imaging Technologies ("SWGIT") and that their procedures did not satisfy the requirements set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S:Ct. 2786, 125 L.Ed.2d 469 (1993), and Frye v. United States, 293 F. 1013 (D.C.Cir.1923). Therefore, Culver argued, testimony about the fingerprint comparison was inadmissible. The trial court heard testimony and extensive arguments from counsel outside the jury's presence, and the trial court denied the motion. The court found that the evidence presented was not scientific evidence and that scientific standards regarding admissibility did not apply; the Court specifically noted that Daubert and Frye did not apply. The court stated that the videotape depicted the image of the thumb, and that the State had simply made a still photograph of the print from the videotape and compared the image to a known print to identify it. The court determined that the State did not create the videotape and that it was therefore not bound by any suggested standards about digital reproduction. [6]

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[6] After the trial court denied the motion to suppress, Culver stipulated, without waiving any argument about the

At the hearing on Culver's motion to suppress, the State presented the testimony of Tom McDanal of the Hoover Police Department, who had observed the ridge detail of a thumb that was depicted in the 8mm videotape. McDanal testified that he made a VHS-format copy of the 8mm videotape and that he had viewed that videotape on his computer. McDanal paused the videotape on the image depicting the ridge detail of the thumb, saved the image onto a computer disk, and gave the disk to evidence technician Mark Tant. McDanal testified about the computer software that he used to view the videotape and to save the image of the thumb, and he testified that he had received training in the use of the software. The trial court viewed in chambers the image on the computer disk McDanal created from the videotape.

Mark Tant testified that he had viewed the image on the disk McDanal provided and that he printed copies of the image from his computer. Tant provided a copy of the print to Carol Walker, a certified fingerprint examiner with the Birmingham Police Department. Tant stated that Walker requested a smaller copy of the image, so that the image would be closer in size to the known fingerprint. Tant reduced the size of the image on his computer and printed that image for Walker.

Walker testified that she received two photographs of the thumbprint and that she

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admissibility of the identification testimony, that the hand depicted in the videotape was his hand. (R. 1728-29.)

compared the prints from the photographs with Culver's known prints. Walker determined that the photographs contained enough detail to make a comparison. She identified 12 points of comparison between the 2 prints and determined that the print on the photograph depicted Culver's right thumb.

The trial court did not abuse its discretion when it denied Culver's motion to suppress testimony about the thumbprint taken from the 8mm videotape. " 'The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion.' " Lewis v. State, [Ms. CR-03-0480, November 2, 2007] --- So.2d ----, ---- (Ala.Crim.App.2007) (opinion on return to remand), quoting Ex parte Loggins, 771 So.2d 1093, 1103 (Ala.2000). Rule 702, Ala.R.Evid., provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The admissibility of fingerprint evidence is governed by Rule 702:

> "Because this case does not involve DNA evidence, the Daubert [v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993),] standard does not apply. Also, because print identification involves subjective

> observations and comparisons based on the expert's training, skill, or experience, we conclude that it does not constitute scientific evidence and that, therefore, Frye [v. United States, 293 F. 1013 (D.C.Cir.1923),] does not apply. Rather, print identification constitutes specialized knowledge that may be helpful to the jury in understanding or determining the facts. Therefore, Rule 702, Ala.R.Evid., governs the admissibility of [the fingerprint examiner's] testimony."

Barber v. State, 952 So.2d 393, 417 (Ala.Crim.App.2005).

Although an image of the thumbprint was used for comparison to Culver's known print in this case, no scientific testing or experiments were involved. Rather, the print provided from the videotape was the exact image of the thumb, itself, rather than an ink lift of a latent or partial print, and it was arguably even more reliable as a source for comparison purposes than a lifted print because it was not subject to decomposition or degradation over time. The process by which McDanal and Tant obtained the image did not involve scientific experiments or testing, but simply the "capturing" of a single image from the videotape recovered from Culver's residence, which was then printed out as a photograph so that it could be compared by Walker to Culver's known fingerprints. Because the testimony about the print identification constituted specialized knowledge that would have been helpful to the jury, we hold that the evidence was admissible under Rule 702, Ala.R.Evid., and that the trial court

correctly concluded that neither Daubert nor Frye were applicable. Therefore, the trial court did not abuse its discretion when it denied Culver's motion to suppress the thumbprint identification testimony, and Culver is not entitled to any relief on this claim of error.

X.

Culver next contends that the trial court erred when it admitted into evidence testimony about the "default date," January 1, 1994, displayed on the 8mm video camera S.B. gave to the police. (Culver's brief at p. 47.) The 8mm videotape the police found in the storage room had a date stamp of January 11, 1994. Culver contends that the proximity of the date on the videotape to the default date on the video camera might have caused the jury to believe that the recovered videotape had been filmed using the video camera S.B. recovered, even though no evidence established a connection between that camera and the videotape.[7] The trial court overruled Culver's objection, and stated that the jury would be permitted to hear the testimony and then to determine what weight to give the evidence.

> " ' "The admission or exclusion of evidence is a matter within the sound discretion of the trial court." Taylor v. State, 808 So.2d 1148, 1191 (Ala.Crim.App.2000), aff'd, 808 So.2d 1215

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[7] S.B. testified that she found the video camera in the playroom/office of the family residence. She stated that she had previously seen the camera in Culver's vehicle and that the camera did not belong to her or to her children. (R. 1400-02.)

> (Ala.2001). "The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion." Ex parte Loggins, 771 So.2d 1093, 1103 (Ala.2000). In addition, "[t]rial courts are vested with considerable discretion in determining whether evidence is relevant, and such a determination will not be reversed absent plain error or an abuse of discretion." Hayes v. State, 717 So.2d 30, 36 (Ala.Crim.App.1997).'
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> " Gavin v. State, 891 So.2d 907, 963 (Ala.Crim.App.2003)."

Woods v. State, [Ms. CR-05-0448, August 31, 2007] --- So.2d ----, ---- (Ala.Crim.App.2007).

Rule 401, Ala.R.Evid., defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Although relevant evidence is admissible, Rule 402, Ala.R.Evid., it "may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, Ala.R.Evid.

Det. McGairty testified that when he turned the video camera on, it displayed a default date of January 1, 1994. The videotape depicting the sexual acts displayed a date of January 11, 1994. Testimony about the default date was relevant because it provided a possible connection between Culver, the videotape, and the camera recovered from the Culver residence, which was relevant to the charge of possession of obscene matter. That testimony was not misleading or confusing, and it did not result in unfair prejudice to Culver.

> " 'Unfair prejudice' under Rule 403 has been defined as something more than simple damage to an opponent's case. Dealto v. State, 677 So.2d 1236 (Ala.Crim.App.1995). A litigant's case is always damaged by evidence that is contrary to his or her contention, but damage caused in that manner does not rise to the level of 'unfair prejudice' and cannot alone be cause for exclusion. Jackson v. State, 674 So.2d 1318 (Ala.Crim.App.1993), reversed in part on other grounds, 674 So.2d 1365 (Ala.1994). 'Prejudice is "unfair" if [it] has "an undue tendency to suggest decision on an improper basis." ' Gipson v. Younes, 724 So.2d 530, 532 (Ala.Civ.App.1998), quoting Fed.R.Evid. 403 (Advisory Committee Notes 1972). See, also, Rule 403, Ala. R. Evid."

Ex parte Vincent, 770 So.2d 92, 96 (Ala.1999).

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it allowed testimony about the default date displayed on the video camera. The testimony was relevant and did not result in unfair prejudice to Culver.

XI.

Culver contends that the trial court did not adequately instruct the jury on constructive possession and circumstantial evidence. Specifically, Culver argues that the trial court failed to charge the jury that, to find Culver guilty of possession of obscene matter based on constructive possession, it had to find that Culver had " 'knowledge of the presence of the item in the place as described.' " (Culver's brief at p. 50, quoting R. 2547.) Culver also argues that he had requested a circumstantial-evidence charge that included an instruction that, in order to find Culver guilty, the evidence had to exclude any reasonable theory of his innocence; that if there was any reasonable theory consistent with Culver's innocence, the jury had to give Culver the benefit of the doubt; and that if there were two possible explanations for the circumstances, one of which indicated Culver was not guilty, then the jury had a duty to give Culver the benefit of the doubt. (Culver's brief at p. 51.) The trial court stated that it would charge the jury on constructive possession and circumstantial evidence, and it provided to the parties its proposed charges. Culver argued during the charge conference and after the court charged the jury that the trial court's instructions on constructive possession and circumstantial evidence were inadequate, and he raised the specific claims he now raises on appeal.

A trial court has broad discretion in formulating its jury charge, so long as the charge accurately reflects the law and the facts of the case. E.g., Powers v. State, 963 So.2d 679 (Ala.Crim.App.2006). We have reviewed the trial court's jury charge, and we hold that the court's instructions on constructive possession and circumstantial evidence accurately reflect the applicable law.

With respect to Culver's argument regarding the trial court's charge on constructive possession, we find that the trial court properly instructed the jury.

> " ' "Constructive possession exists when the defendant exercises, or has the power to exercise, dominion and control over the item." United States v. Laughman, 618 F.2d 1067, 1077 (4th Cir.1980); United States v. Phillips, 496 F.2d 1395, 1397 (5th Cir.1974). "Constructive possession may be determined by weighing those facts which tend to support the defendant's necessary control over the substance against those facts which demonstrate a lack of dominion and control." Roberts [v. State], 349 So.2d [89] at 91 [(Ala.Crim.App.1977)].'
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> " German v. State, 429 So.2d 1138, 1140 (Ala.Crim.App.1982)."

Flake v. State, 980 So.2d 440, 443 (Ala.Crim.App.2007). The trial court defined constructive possession using language very similar to that quoted above. (R. 2518-19.) The court also informed the jury that to establish Culver's guilt, the State had to prove that Culver "knowingly" possessed a visual reproduction of obscene matter, and the court defined "knowingly" for the jury. (R. 2514, 2517.) The court's instructions on constructive possession accurately reflected the law applicable to the case.

Likewise, with respect to Culver's argument regarding the trial court's circumstantial-evidence charge, we find that the court properly instructed the jury. The trial court defined circumstantial evidence, gave examples of circumstantial evidence, and repeatedly instructed the jury that circumstantial evidence was sufficient to support a conviction only if the jury was convinced of Culver's guilt beyond a reasonable doubt. (R. 2520-22.) The court instructed the jury that "[a] conviction may not be had upon circumstantial evidence if there is an inference consistent with the innocence of the defendant" (R. 2521), and instructed the jury that a reasonable doubt leading to acquittal could come from the evidence, lack of evidence, or any part of the evidence. We conclude that the court's jury charge adequately instructed the jury on circumstantial evidence.

We note, furthermore, that in Ex parte Carter, 889 So.2d 528 (Ala.2004), the Alabama Supreme Court held that a circumstantial-evidence instruction is not required even when all the evidence is

circumstantial, provided the jury is charged about proof and about reasonable doubt. That Court stated:

> "[I]n Holland v. United States, 348 U.S. 121[, 75 S.Ct. 127, 99 L.Ed. 150] (1954), the Supreme Court of the United States abolished the requirement that federal courts give an instruction to the effect that when the prosecution's evidence is circumstantial, it must be such as to exclude every reasonable hypothesis other than that of guilt. The Supreme Court stated that 'the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect.' 348 U.S. at 137. See also Jackson v. Virginia, 443 U.S. 307, 326[, 99 S.Ct. 2781, 61 L.Ed.2d 560] (1979) (rejecting the rule that in a case based solely on circumstantial evidence the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt). Direct and circumstantial evidence are of equal weight; all that is required to find a defendant guilty is that the jury be convinced of the defendant's guilt beyond a reasonable doubt. Holland v. United States; Jackson v. Virginia.
>
> "We find that the trial court properly instructed the jury in this case. In a

criminal case in which all of the evidence is circumstantial, a jury instruction is proper if it states the elements of the crime, explains how the jury should evaluate the evidence, and instructs the jury that it can convict the defendant only if the jury finds that the State has proved each element of the crime beyond a reasonable doubt and the State has disproved the defendant's presumption of innocence beyond a reasonable doubt. The Supreme Court of the United States in *Holland* stated:

> " 'Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.'
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> "348 U.S. at 137-38."

889 So.2d at 532-33. "Although a trial court may give a circumstantial-evidence instruction if it finds the instruction appropriate or helpful in a particular case, a trial court is not required to give the jury such an instruction merely because all of the State's evidence in a criminal case is circumstantial." 889 So.2d at 533.

Here, the jury was properly instructed on the elements of the crime and that it had to find those elements beyond a reasonable doubt before it could find Culver guilty. Thus, a circumstantial-evidence charge was not even required here, and Culver's claim to the contrary is meritless.

XII.

Culver contends that the trial court erred when it denied his request for a jury instruction on attempted possession of obscene matter as a lesser-included offense of possession of obscene matter. He argues, specifically, that the presence of his thumbprint on the outer case of the videotape established only that he touched the videotape, and not that he actually picked it up or possessed it. Culver presented this argument to the trial court, and the court denied his request for a jury instruction on attempted possession.

> "A defendant has the right to request a jury charge based upon any material hypothesis that the evidence tends to establish, and where there is a reasonable theory to support a requested charge as a lesser-included offense, a trial court's

> refusal to give the charge is reversible error. See Ex parte Chavers, 361 So.2d 1106 (Ala.1978); Miller v. State, 675 So.2d 534 (Ala.Crim.App.1996). A court may, however, properly refuse to charge on a lesser-included offense '(1) when it is clear to the judicial mind that there is no evidence tending to bring the offense within the definition of the lesser offense, or (2) when the requested charge would have a tendency to mislead or confuse the jury.' Chavers, 361 So.2d at 1107 (emphasis added). Furthermore, § 13A-1-9(b), Ala.Code 1975, states that '[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.' "

Ryan v. State, 865 So.2d 1239, 1244 (Ala.Crim.App.2003).

The trial court did not err when it refused to instruct the jury on attempted possession of obscene matter. The evidence indicated that the videotape had been placed in the storage room at Culver's residence that was accessible only through the master-bedroom closet, and the videotape depicted Culver engaging in sexual acts with a naked female that the State alleged to be K.W. There is no reasonable theory of the evidence that the presence of Culver's thumbprint on the videotape's case established that Culver had in some way touched the videotape but had not actually possessed it. "The basis of a charge on a lesser-included offense must be derived from the evidence presented at trial and

cannot be based on speculation or conjecture." Broadnax v. State, 825 So.2d 134, 200 (Ala.Crim.App.2000), aff'd, 825 So.2d 233 (Ala.2001). Although Culver argues that he could have touched the videotape without actually gripping or possessing it, there was no evidence, only conjecture, supporting that argument.

Moreover, the State presented evidence tending to establish that Culver possessed additional obscene matter-the Polaroid photographs depicting the naked female that the State argued was K.W.-that were found in envelopes between books in the playroom/office in the Culver residence.[8] Culver does not argue on appeal that he only attempted to possess the photographs. Proof of Culver's possession of the photographs was sufficient, by itself, to support the conviction for possession of obscene matter.

For these reasons, the trial court did not err when it denied Culver's request for a jury charge on attempted possession as a lesser-included offense.

XIII.

Culver contends that the evidence was insufficient to sustain his convictions for possession of obscene material. Specifically, Culver argues that the State failed to prove that the female depicted in the photographs and on the videotape was a minor. As discussed in Part II of this opinion, possession of

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[8] As discussed in Part II of this opinion, the possession of the videotape and the photographs supported only one charge of possession of obscene matter.

the photographs and the videotape constituted only a single criminal act; therefore, we consider Culver's argument only to determine whether the State established sufficient evidence to support a single count of possession of obscene matter, and whether the trial court erred when it denied Culver's motions for a judgment of acquittal.

> "Initially, we note our well-established standard for reviewing challenges to the sufficiency of the evidence: ' "In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution." ' Ballenger v. State, 720 So.2d 1033, 1034 (Ala.Crim.App.1998), quoting Faircloth v. State, 471 So.2d 485, 488 (Ala.Crim.App.1984), aff'd, 471 So.2d 493 (Ala.1985). ' "The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt." ' Nunn v. State, 697 So.2d 497, 498 (Ala.Crim.App.1997), quoting O'Neal v. State, 602 So.2d 462, 464 (Ala.Crim.App.1992). ' "When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to

> the jury, and, in such a case, this court will not disturb the trial court's decision." ' Farrior v. State, 728 So.2d 691, 696 (Ala.Crim.App.1998), quoting Ward v. State, 557 So.2d 848, 850 (Ala.Crim.App.1990). 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is *legally* sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So.2d 1040, 1042 (Ala.1978)."

Oliver v. City of Opelika, 950 So.2d 1229, 1230 (Ala.Crim.App.2006). Section 13A-12-192(b), Ala.Code 1975, the statute under which Culver was charged, provides that "[a]ny person who knowingly possesses any obscene matter containing a visual reproduction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual conduct shall be guilty of a Class C felony."

The evidence indicated that the police found Polaroid photographs depicting the genitalia of a naked female inside envelopes between books in the playroom/office next to K.W.'s bedroom in the Culver residence. An 8mm videotape depicting what appeared to be the same female depicted in the photographs was recovered two days later in a storage room of the Culver residence, an area that was accessed through the master bedroom. For the first several minutes of the videotape, the female's genitals were manually manipulated and her vagina was penetrated digitally and by what appeared to be

a plastic vaginal syringe. The sheets beneath the female's body in the photographs and on the videotape appeared to be the same color and they bore the same distinctive pattern. A variety of other details in the photographs of the female are similar to those in the first portion of the videotape, including the placement of the female's hands and the nail polish on the fingernails, suggesting that the photographs were taken and the film was made at or near the same time and in the same location.

K.W. testified that she recognized herself in the photographs. She testified that she recognized her hands, her fingernails, her vagina and shaved pubic region, and the blue sheets on which she was lying. K.W. testified that the sheets had been used on the bed her mother and Culver shared at the house at Smith Lake. S.B. also recognized K.W.'s body and Culver's genitalia in the photographs. At trial, S.B. viewed the photographs and testified that she recognized K.W.'s slender hands and her body, including K.W.'s shaved pubic area. S.B. also testified that she recognized the sheets on which K.W. was lying; those sheets had been purchased for Culver for Christmas 2002, and they were used exclusively at the lake house. Photographs of K.W.'s hands and genitalia were taken at a clinic and were displayed to the jury; photographs of S.B.'s hands and genitalia were taken and they, too, were displayed to the jury. In addition, Culver stipulated that he was the man in the videotape.

Viewing the evidence in the light most favorable to the State, we conclude that the State

established a prima facie case of possession of obscene matter and that the trial court properly submitted this case to the jury. From the evidence, the jury could have reasonably concluded that it was, in fact, K.W., a minor, who was depicted in the photographs and on the videotape and, that Culver was, in fact, in constructive possession of the photographs and the videotape. Moreover, we note that although Culver attempted to undermine S.B.'s identification of her daughter in the photographs during cross-examination and attempted to elicit testimony suggesting that K.W. was not the female in the second portion of the videotape-the portion of the videotape depicting a woman's back and buttocks and digital penetration of the woman's vagina and anus-these factors do not, as Culver argues, affect the sufficiency of the evidence, but go to the weight of the evidence. See Part XIV of this opinion. K.W. positively identified herself in the photographs and, even if K.W. was not the woman depicted in the second portion of the videotape, K.W. testified that she was depicted on the first portion of the videotape. Culver's assertion that a second woman might have been depicted in the second portion of the videotape does not negate the fact that the State presented evidence indicating that Culver also photographed and filmed K.W.'s nude genitalia. Therefore, the trial court properly denied Culver's motions for a judgment of acquittal.

XIV.

Culver contends that the jury's verdict was against the weight of the evidence. He argues that, although this Court does not generally reweigh the evidence or evaluate witness credibility, nonetheless,

in this case he is entitled to a reversal because, he says, the evidence was "uncertain, highly suspect, compromised, biased, financially motivated, and outright impeached ...." (Culver's brief at p. 66.) Culver filed a motion for a new trial in which he challenged the weight of the evidence. The trial court denied the motion without a hearing.

A trial court's ruling on a motion for a new trial will not be reversed unless the trial court abused its discretion. See, e.g., State v. Williams, 679 So.2d 275, 276 (Ala.Crim.App.1996). In arguing that the trial court erred when it denied his motion for a new trial, Culver challenges the jury's decision based on his own analysis of the weight of the evidence and the credibility of the witnesses. However, as Culver concedes:

> " 'We have repeatedly held that it is not the province of this court to reweigh the evidence presented at trial.' Whitt v. State, 733 So.2d 463, 470 (Ala.Crim.App.1998). ' "[T]he credibility of witnesses and the weight or probative force of testimony is for the jury to judge and determine." ' Harris v. State, 513 So.2d 79, 81 (Ala.Crim.App.1987), quoting Byrd v. State, 24 Ala.App. 451, 451, 136 So. 431, 431 (1931). ' "When the jury has passed on the credibility of evidence tending to establish the defendant's guilt, this Court cannot disturb its finding." ' Rowell v. State, 647 So.2d 67, 69 (Ala.Crim.App.1994), quoting Collins v.

> State, 412 So.2d 845, 846 (Ala.Crim.App.1982). 'Any issues regarding the weight and credibility of the evidence are not reviewable on appeal once the state has made a prima facie case.' Jones v. State, 719 So.2d 249, 255 (Ala.Crim.App.1996), aff'd, 719 So.2d 256 (Ala.1998)."

Clark v. State, 896 So.2d 584, 638 (Ala.Crim.App.2000) (opinion on return to remand and on application for rehearing).

Here, the jury resolved issues regarding the weight and credibility of the evidence in favor of Culver with respect to the charges of domestic violence and furnishing drugs to a minor. The jury resolved the issues regarding the weight and the credibility of the evidence against Culver as to the charges of possession of obscene matter.[9] Like the trial court that denied Culver's motion for a new trial, this Court also is not at liberty to reweigh the evidence. Once the State presented a prima facie case, the evaluation of all of the evidence, including consideration of any inconsistencies in the evidence and any alleged witness bias, was properly left to the jury for its resolution. Culver is not entitled to any relief on this claim of error.

XV.

Finally, Culver contends that, even if no single error was sufficiently prejudicial to require reversal, the

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[9] As discussed in Part II of this opinion, the possession of the videotape and the photographs supported only one charge of possession of obscene matter.

accumulated errors affected his substantial rights and require a reversal of the case and remand for a new trial.

> "As the Alabama Supreme Court has so succinctly stated, the cumulative-error rule is as follows: '[W]hile, under the facts of a particular case, no single error among multiple errors may be sufficiently prejudicial to require reversal under Rule 45, [Ala.R.App.P.,] if the accumulated errors have "probably injuriously affected substantial rights of the parties," then the cumulative effect of the errors may require reversal.' Ex parte Woods, 789 So.2d 941, 942 n. 1 (Ala.2001) (quoting Rule 45, Ala.R.App.P.)."

Brownfield v. State, [Ms. CR-04-0743, April 27, 2007] ---So.2d ----, ---- (Ala.Crim.App.2007).

We have examined all of Culver's allegations and we found one error, addressed in Part II of this opinion, which requires a remand so that the trial court can set aside one of the convictions and sentences for possession of obscene matter. However, we found no other error in the specific instances alleged by Culver, and therefore, we conclude that there exists no cumulative error requiring reversal based on those allegations.

XVI.

Based on the foregoing, we affirm one of Culver's convictions for possession of obscene matter, and the sentence imposed for that conviction. However, for the reasons set forth in Part II of this

opinion, we reverse the conviction and sentence for the second charge for possession of obscene matter and remand this case for the trial court to vacate that second conviction and sentence.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

McMILLAN, SHAW, and WELCH, JJ., concur. WISE, J., concurs in the result. BASCHAB, P.J. concurs in part; dissents in part, with opinion.

BASCHAB, Presiding Judge, concurring in part and dissenting in part.

I disagree with the majority's conclusion that "Culver committed only a single criminal act when he possessed both forms of obscene material." --- So.2d at ----. I cannot believe that the Legislature envisioned such a result. Even though they may have been produced during the same incident and depict the same incident, the obscene materials were in very different forms and involved very different modes of production. Also, they were stored in different locations. Therefore, the jury reasonably concluded that he was guilty of two separate counts of possession of obscene matter. Accordingly, I dissent as to Part II of the majority opinion and the parts related thereto and concur as to the remainder of the opinion.

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

Lane W. Mann
Clerk **(SEAL)**

Gerri Robinson
Assistant Clerk

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August 22, 2008

CR-06-0468

Brian Scott Culver v. State of Alabama (Appeal from Bessemer Division, Jefferson Circuit Court: CC04-341; CC04-342)

NOTICE

You are hereby notified that on August 22, 2008 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

s/Lane W. Mann, Clerk
Court of Criminal Appeals

cc: Hon. Earl N. Carter, Jr. Circuit Clerk
Herbie Brewer, Attorney
Madeline H. Lewis, Asst. Attorney General

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

(SEAL)

May 15, 2009

1071641

Ex parte Brian Scott Culver. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Brian Scott Culver v. State of Alabama) (Jefferson Circuit Court, Bessemer Division: CC04-341; CC04-342; Criminal Appeals : CR-06-0468).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in the cause on May 15, 2009:

Writ Denied. Murdock, J. – Cobb, C.J., and Lyons, Stuart, and Bolin, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless

otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 15th day of May, 2009.

s/Robert G. Esdale
Clerk, Supreme Court of Alabama